United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

F 939

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,085

GEORGE A. CONNELLY, *Appellant*,

v.

SECRETARY OF THE NAVY, ET AL., *Appellees*.

On Appeal From an Order of the United States District Court for the District of Columbia

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

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JOINT APPENDIX

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Civil Docket

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2133-64

GEORGE CONNELLY, *Appellant*

v.

PAUL H. NITZE, ET AL., *Appellees*

PROCEEDINGS

Date

1964

Aug. 31—Complaint filed.

Sept. 1—First Amended Complaint filed.

1965

Jan. 4—Answer filed.

1967

Jan. 26—Plaintiff's Motion for summary judgment filed.

Feb. 24—Defendants' Cross-Motion for sumary judgment filed.

Apr. 14—Order granting defendants' motion and denying plaintiff's cross-motion for summary judgment filed.

May 12—Notice of Appeal.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2133-64

GEORGE A. CONNELLY, Leonardtown, Maryland, *Plaintiff*,

v.

PAUL H. NITZE, Secretary of the Navy,
Washington, D. C.

JOHN W. MACY, JR., Chairman,
Civil Service Commission,

LUDWIG J. ANDOLSEK, Commissioner,
Civil Service Commission

ROBERT E. HAMPTON, Commissioner,
Civil Service Commission, Washington, D. C.,
Defendants.

First Amended Complaint

SUIT FOR DECLARATORY JUDGMENT FIXING AND DETERMINING THE RIGHTS OF PLAINTIFF TO RESTORATION TO HIS POSITION IN THE EMPLOYMENT OF THE UNITED STATES AND FOR OTHER RELIEF IN THE NATURE OF A MANDATORY ORDER RESTORING PLAINTIFF TO HIS POSITION.

Plaintiff, by his attorney, Edward L. Merrigan, pursuant to the provisions of Rule 15(a) of the Federal Rules of Civil Procedure, and before any responsive pleading to the Complaint herein has been served or filed, hereby files and serves this First Amended Complaint and respectfully alleges:

1. Plaintiff is a citizen of the United States and a resident of the State of Maryland.

2. Defendant, Paul H. Nitze, is the duly appointed, acting and qualified Secretary of the Navy of the United States, and is the officer charged by law with the administration

of the Navy Department and the rules and regulations governing employment of civilian employees under the jurisdiction of the Department of the Navy, including employees at the United States Naval Air Station, Patuxent River, Maryland; and as such officer is the official of the United States clothed with the power and authority necessary to direct and order plaintiff's restoration to duty upon the order or judgment of this Court in this action; and, said defendant is sued herein in his official capacity only.

3. Defendant, John W. Macy, Jr., is the duly appointed, acting and qualified Chairman of the United States Civil Service Commission, charged by law with the administration of the so-called Civil Service Laws, Veterans Preference Act and other Executive Orders and Regulations which govern the appointment and retention in service of civilian employees of the United States; and said defendant is sued herein in his official capacity only.

4. Defendants, Ludwig J. Andolsek and Robert E. Hampton, are the other duly appointed, acting and qualified members of the Civil Service Commission, and said defendants, with defendant Macy hereinabove referred to, are charged with the administration of the aforementioned Civil Service Laws, Veterans Preference Act, and the other Executive Orders, rules and regulations which govern the appointment and retention in service of civilian employees of the United States; and they are sued herein in their official capacities only.

5. The jurisdiction of this Court over this action is based on the provisions of Title 28 U.S.C. Section 1331, this action being one which arises under the Constitution and laws of the United States wherein the matter in controversy exceeds the sum or value of $10,000., exclusive of interest and costs; and on the provisions of Title 5 U.S.C. Section 1001 et seq., same being more commonly known as the Administrative Procedures Act; and on the provisions of

Section 11-306 of the District of Columbia Code, 1961 Edition; and finally, of course, under those further statutes of the United States which give this Court jurisdiction to make declaratory judgments and to afford injunctive relief.

6. Heretofore, and on or about May 19, 1961, plaintiff was a classified civil service employee of the United States employed as a Fire Fighter, Grade GS-081-4, by the Department of the Navy at the United States Naval Air Station, Patuxent River, Maryland.

7. On or about May 19, 1961, plaintiff received a notice of proposed removal from his position from the Commanding Officer of the said Naval Air Station, which notice proposed to remove plaintiff on the basis of alleged "immoral, indecent, notoriously disgraceful conduct as delineated in Article 26 of Standard Schedule of Disciplinary Offenses and Penalties for Civilian Employees in the Naval Establishment." Said Notice went on to state:

> "Specifically, you are charged with the commission of homosexual acts with Donald L. Etheridge, 549-76-46, SA, USN; Robert C. Morrill, 537-12-38, SR, USN and William (n) Coyle, 479-95-21, AA, USN, during the period of 1 January 1961 to 1 May 1961. It is considered that these acts reflect unfavorably on your suitability as a government employee and it is considered in the best interest of the government that you be removed from the employment rolls of the station.
>
> "You are advised that you may reply personally and or in writing to this notice and may furnish affidavits in support of your reply. You are further advised that you may request a formal hearing at which you may be represented by any two persons of your choice and may call a reasonable number of witnesses. Your reply and/or request for a formal hearing should be made to the Industrial Relations Officer within five work days after receipt of this letter. Any informa-

tion or assistance you desire will be furnished by the Industrial Relations Department.

"During the notice period you will be scheduled for work as usual."

8. In accordance with the provisions of this notice, plaintiff requested a formal hearing; and said hearing proceeded on May 31, 1961 before a Grievance Advisory Committee appointed pursuant to rules and regulations administered by defendant, the Secretary of the Navy.

9. At the outset of this hearing, plaintiff and his counsel requested additional time within which to prepare plaintiff's defense and to accumulate evidence in support thereof. This request was summarily denied. The Committee thereupon directed plaintiff and his counsel to call any witnesses they intended to call. Plaintiff's counsel objected to this procedure, insisting that in a case of this nature and under the Navy's own Regulations (NCPI 750. Sect. 5-5(e)(b)), the accused employee should not be called upon to present his defense until "the evidence in support of the charges . . . (has been) introduced." This objection was arbitrarily and capriciously overruled, the Chairman of the Committee stating:

> "We don't intend to call any witnesses at this particular time . . . . This is not a court. We are just arriving at facts. We have some facts in our hands right now and we want other facts . . . ."

Plaintiff was thereupon directed to call his witnesses, and he summoned a series of character witnesses, who testified that they had known the plaintiff over a long period of years and that he possessed a very good character and reputation in his work and in the community. Further testimony of this nature was submitted and accepted in the form of letters from the Sheriff, St. Mary's County, Maryland; Deputy Sheriff; president of a national bank; the

Chairman of the Liquor Board, St. Mary's County, Maryland, and others.

10. The Chairman of the Grievance Committee thereupon directed plaintiff to comment on the charges against him. Plaintiff denied the charges. The Chairman thereupon directed the three navy enlisted men named in the charges against the plaintiff to appear and testify. Each was called. The first, Donald L. Etheridge, appeared but refused to testify regarding any of the alleged charges against the plaintiff. When plaintiff's counsel sought to interrogate the witness regarding a violent physical attack he had made with a wrench upon the plaintiff, the Chairman of the Grievance Committee refused to admit the interrogation, stating ". . . we are going to have to let Mr. Etheridge go . . . He is obviously not going to answer and since he is not, it is just useless to keep going on . . ."

The second alleged complainant, one Robert C. Morrill, was then called to testify. Like the first named complainant, he likewise refused to testify against the plaintiff.

The third alleged complainant, one William Coyle, was thereupon summoned by the Committee. This witness testified that he had a past conviction for malicious destruction of property, but he thereupon refused to testify further regarding the charges against the plaintiff.

11. The Committee thereupon called upon plaintiff to testify and he agreed to do so. During the course of the interrogation by the Committee, it was developed that plaintiff was responsible for the support of his father and mother; that he had lived in the local Leonardtown, Maryland community all of his life; that he had been employed by the Navy since 1943, or a period of approximately 17 years. Upon interrogation by his own counsel, plaintiff testified as follows:

> "Q. Did you commit any unnatural acts with any of these men?

"A. No, sir . . . .

"Q. You say you did not commit any of these acts?

"A. No, sir.

"Q. Ever been in any trouble at all?

"A. No, sir.

"Q. You have been 17 years at the fire station?

"A. 17 years and this is the first time I have ever been in trouble.

"Q. Have you ever been accused of these acts before?

"A. No, sir."

12. When plaintiff was thereupon excused as a witness, several of his fellow employees were called and testified favorably about the plaintiff's character and reputation. Then, and although the Navy's own Regulations (NCPI 750, 5-5(f)(2)) specifically provide that "charges do not constitute evidence," the Chairman of the Grievance Committee insisted upon reading into the record the written charges allegedly made against the plaintiff by the three complainants who refused to testify as aforesaid. He thereupon insisted again upon interrogating the plaintiff as follows:

"Chairman: Do you deny the contents of these statements?

"App.: Yes, I do.

"Chairman: Do you deny all, in part, or all of the statements?

"App.: These are all untrue as far as I'm concerned."

13. Thereafter, and on or about June 6, 1961 and solely on the basis of this record, the Commanding Officer of defendant Secretary of the Navy's Naval Air Station at Patuxent River, Maryland, issued a final decision removing plaintiff from his position, effective 9 June, 1961. This decision read, in pertinent part, as follows:

"Specifically, you were charged with the commission of homosexual acts with Donald L. Etheridge . . .; Robert C. Morrill . . . and William (n) Coyle . . . . It was considered that these acts reflect unfavorably on your suitability as a government employee and it is considered in the best interest of the government that you be removed from the employment rolls of the station.

"At your hearing before the Field Grievance Advisory Committee on 31 May 1961 statements of your associates in these acts were read to you and you were given ample opportunity to present evidence and to refute the charge against you. It is considered that you failed to present such evidence or other explanation that would deny these statements. It is, therefore, the final decision of this command that you be removed from the rolls of this station effective 9 June 1961 . . ."

14. Thereafter, and on or about June 8, 1961, plaintiff filed an appeal from this decision with the office of the defendant Secretary of the Navy.

15. While this appeal was pending, and on or about June 9, 1961, one of the alleged complainants against plaintiff herein, to wit, the aforesaid Robert C. Morrill, made and signed the following statement in writing:

"To Whom It May Concern: I, Robert C. Morrill, 537-12-28 Seaman Recruit, U.S.N., do hereby solemly (sic) sware (sic) without reservation that the Statement or statements, oral or written, perstaining (sic) to homesexual (sic) acts bettween (sic) George A. Connelly, firefighter (General) GS-4, employed at patuxent (sic) Naval Air Station and my self are completely false. I'm making this statement of my own free will and accord.

Melvin F. Wells
Witness

s/ Robert C. Morrill
June 9, 1961."

16. On or about June 14, 1961, the Industrial Relations Officer at the Patuxent Naval Air Station returned to plaintiff his appeal, stating that it was technically insufficient and that it should be resubmitted. Said appeal was resubmitted on or about June 27, 1961.

17. Thereafter, and on or about December 1, 1961, defendant, the Secretary of the Navy, sustained plaintiff's appeal, stating as follows:

> "1. Your appeal has been reviewed and is sustained because it is considered that the procedure followed in effecting your removal from employment was fatally defective.
>
> "2. In view of the foregoing, the Commanding Officer of the Naval Air Station is being requested to offer you restoration to duty.
>
> "3. For your information, should you accept restoration to duty, new and procedurally correct action to remove you may be initiated upon your return to duty."

18. On or about December 18, 1961, the Commanding Officer of the Patuxent Naval Air Station notified plaintiff in writing that in the event he desired to be restored to duty, he should report to the Security Office on December 21, 1961 for reinstatement.

19. However, when plaintiff reported for duty in response to this letter, the commanding officers and supervisory personnel at the Station embarked upon a well calculated course of conduct whereby plaintiff was treated as a pariah and he was intentionally subjected to continuous humiliation and disgrace. First of all, he was denied a regular employee's permit, required by all employees for entry and departure at the Station. Rather, plaintiff was required to report to a special Security Post and was there escorted around the Station by a guard. Secondly, plaintiff was arbitrarily and capriciously assigned to work at

a place distant from his old place of employment at the Station itself; and while this place was only 14 miles from the Station by boat and while all other employees so assigned were permitted to travel to and from their place of employment by boat, plaintiff was expressly and purposefully excluded from this privilege on the ground that his presnce on the boat would be embarrassing and detrimental to his fellow employees. Plaintiff was accordingly required to travel alone 70 miles over land each day to and from this distant point in order to retain his employment.

20. Thereafter, and on or about January 25, 1962, and in further pursuit of the aforementioned program of harassment and oppression directed at plaintiff herein, the Commanding Officer at the Patuxent River Naval Air Station caused to be drafted and served on plaintiff another Notice of proposed removal, same being based entirely on substantially the same old charges, with the one exception that those involving the aforementioned Robert C. Morrill (who subsequently admitted the charges allegedly emanating from him were false) were omitted and deleted from the Notice. The said Notice of proposed removal, dated January 25, 1962, reads, in pertinent part, as follows:

> "1. You are hereby notified that it is proposed to remove you from the employment rolls of this station on 16 February 1962. This proposed removal is based on statements implicating you in the commission of homosexual acts, which, if true, would constitute immoral conduct, as set forth in Article 26 of the Standard Schedule of Disciplinary Offenses and Penalties for Civilian Employees in the Naval Establishment.
>
> "2. The basis for this charge is that it appears that you committed two homosexual acts with Donald Lee Etheridge (former enlisted man attached to the Naval Air Station, Patuxent River, Maryland) in St. Mary's

County, Maryland, during the period 1 January to 1 May 1961. Also, it appears that you committed four homosexual acts with William (n) Coyle (former enlisted man attached to the Naval Air Station, Patuxent River, Maryland) in St. Mary's County, Maryland, on or about 15 January 1961, 20 January 1961, 20 February 1961 and in March 1961. Further, it appears that you committed the fifth homosexual act with the same William (n) Coyle on the night of 14 June 1961, on a road just outside of Leonardtown, St. Mary's County, Maryland. Copies of statements made by Donald Lee Etheridge and William (n) Coyle, upon which these charges are based, are attached hereto as Enclosure (1), and are to be considered as part of this notice.

"3. You are advised that you may reply personally and/or in writing to this notice and may furnish affidavits in support of your reply. You are further advised that you may request a formal hearing at which you may be represented by any two persons of your choice and may call a reasonable number of witnesses. Your reply and/or request for a formal hearing should be made to the Industrial Relations Officer within five work days after receipt of this letter. Any information or assistance you desire will be furnished by the Industrial Relations Department.

"4. During the notice period you will be scheduled for work as usual."

21. Because the aforesaid notice was based on the same old charges as those contained in the prior notice which had been rejected as defective and improper, and because the two alleged complainants had steadfastly refused to testify in support of the alleged charges, and because the validity and veracity of all of the charges had clearly been impeached by Morrill's written Confession and retraction

as aforesaid, and because plaintiff had submitted in the record all of the evidence he could possibly file to support his good character, reputation and innocence, and since the aforesaid action of January 25, 1962, was so patently frivolous, arbitrary and capricious on its face, plaintiff elected to stand on the record theretofore made during the first hearing proceeding, and he accordingly notified the Commanding Officer of the Patuxent River Naval Station as follows:

> "... A hearing would serve no useful purpose as no new charges were presented, and I have already successfully answered the old charges.
>
> "In reply to your notice of proposed removal, please be assured that I plead innocent to any and all charges stated and presumed in your letter ... Your present disposition ... to re-dismiss me from service on an identical set of charges is an undisguised attempt to nullify the orders of higher echelon and a deliberate case of placing me in double jeopardy.
>
> "I request that you see fit to put an immediate arrest to the illegal and improper personnel action which, if allowed to go through, threatens to jeopardize my interests. Failing your rescinding the illegal action, I wish to advise you that I will be compelled to take appropriate legal steps to protect my job rights and seek such legal action against any and all persons acting singly or in joint conspiracy to defame me by their false, pernicious and damaging accusation.
>
> "If further communication or correspondence is required in regard to this matter, please refer it to my attorney, Mr. Wm. Loker, Jr., Leonardtown, Maryland ...."

22. Thereafter, and just one week later, on February 8, 1962, and without producing, exhibiting or referring to any

new witness or evidence of any nature or kind against the plaintiff and apparently relying exclusively upon the hearing record made as heretofore stated on May 31, 1961, the Commanding Officer of the Patuxent River Naval Air Station arbitrarily, capriciously and unlawfully again removed plaintiff from his position as an employee of the United States. In his decision, the Commanding Officer stated:

> "I have considered your reply of 1 February 1962, but have determined that your conduct was immoral, and that you did commit homosexual acts with Donald Lee Etheridge and William (n) Coyle as described in the advance notice and in their statements, enclosures (1), (2), and (3), copies of which were furnished you with your advance notice of proposed removal, dated 25 January 1962. Therefore, it is my decision that your removal from the employment rolls of this station will be effected on 16 February 1962. This action is being taken in the best interests of the federal service."

23. Plaintiff thereupon appealed both to defendant, the Secretary of the Navy, and to defendant Civil Service Commissioners.

24. On March 30, 1962, the director of the third region of defendant Civil Service Commissioners arbitrarily, capriciously and unlawfully denied plaintiff's appeal, stating:

> "Our review of the case shows that the agency complied with the cited regulations in carrying out the action. Since we have found that your rights were preserved in this connection, the appeal is denied . . . .
>
> ". . . The 'merits' of the agency action, including the sufficiency of the reasons given in the agency notices for the adverse decision, were *not* for consideration in your case, being outside the Commission's authority. Your recourse, if any, on such aspects of

the action would be under administrative appeal procedures of the agency."

On further appeal to defendant Commissioners' Board of Appeals and Review, the Board affirmed the decision of the third region on or about August 13, 1962.

25. On October 8, 1962, defendant, the Secretary of the Navy, likewise arbitrarily, capriciously and unlawfully denied plaintiff's appeal, stating:

> "It is found that the action taken by the Commanding Officer of the U. S. Naval Air Station, Patuxent River, was warranted under the circumstances."

26. On May 24, 1963, defendant Civil Service Commissioners affirmed the decision of their Board of Appeals and Review, stating:

> "The Civil Service Commissioners have given careful consideration to the representations made . . . in support of the request for reopening and reconsideration of Mr. Connelly's case. As the result, they have found that the current representations fail to demonstrate probable error in the decision of the Board of Appeals and Review and, accordingly, the request for reopening of Mr. Connelly's appeal is denied . . . ."

27. Plaintiff asserts that he was wrongfully, unlawfully and improperly removed from his position because there was no valid proof or evidence of any kind that he committed the acts with which he was charged or that he otherwise violated the law or Navy Regulations in any respect.

28. Plaintiff asserts further that he was wrongfully, unlawfully and improperly removed from his position, without lawful or just cause or grounds and without such cause as would promote the efficiency of the Government service and contrary to the provisions of Title 5 U.S.C.

Sections 633(9) and 652 by arbitrary, capricious and unjust superiors and commanding officers, who were bent solely on dismissing and discharging the plaintiff irrespective of the lack of any valid evidence against him and irrespective of the fact that one of the complainants against him admitted in writing that the charges were false and concocted, and another admitted in formal testimony that he had been subject to the jurisdiction of Juvenile Courts for alleged violations of the law on at least two or three occasions before he entered the Navy and that he had been trying to find a way to obtain a discharge from the Navy at or about the time he made the charges against plaintiff herein.

29. Plaintiff asserts further that the entire procedure whereby he was removed from his position was unjust, arbitrary and capricious and was defective, unlawful and improper in that same violated the provisions of Title 5 U.S.C. Sections 633(9) and 652 and a long line of Navy Regulations, as follows: NCPI 750 6-4(b), which provides: "When a suspension or removal action is found to be procedurally defective, a new and procedurally correct action may be initiated against the employee. Such action should normally be initiated within 15 days after the date the suspension or removal is cancelled"; NCPI 750 6-4(f), which sets forth the standards and procedures to be observed at hearings in the Navy's Grievance system; and more particularly those provisions of NCPI 750 6-4(f) which state:

> "(2) The employee shall be advised of the charges and of the contemplated penalty. The evidence in support of the charges will then be introduced . . . . Charges do *not* constitute evidence;
>
> "(3) The employee shall be given full opportunity to reply to and refute the evidence and charges against him and to question all witnesses at the hearing;

"(5) The hearing officer or board shall make every effort to elicit all of the facts bearing on the case whether those facts support the charges or support the employee's position; to confront the employee with the witnesses against him."

30. Plaintiff asserts further that the entire procedure whereby he was removed from his position was unjust, arbitrary and capricious and was defective, unlawful and improper in that same violated Navy Regulations NCPI 750 5-5(a) and (b) inasmuch as no hearing was held "for the purpose of obtaining facts on which an equitable decision may be based" or, under the circumstances presented, to obtain, on the part of defendant Secretary of the Navy, "a better understanding of the issues and more equitable action." Said procedure also violated the provisions of NCPI 750 5-5(d) in that the final decision dismissing plaintiff did not set forth valid reasons or "findings made with respect to each charge specifically identified" or findings stating "specifically what charges in the advance notice were found to be established" or how and on the basis of what evidence or testimony. Finally, the procedure violated the provisions of NCPI 750 5-3 and NCPI 750 2-3(c)(1), (2), (3) and (4), which read in part as follows:

"(1) The primary function of disciplinary procedure prior to decision is to determine the facts, not to provide a means for prosecuting the employee . . . .

"(3) The employee must be confronted with all the evidence that influences Management's consideration of the case and must be permitted to defend himself against such evidence . . . .

"(4) It is Management's responsibility to ascertain all pertinent facts prior to making a final decision and to uncover and attach due weight to factors supporting the employee's position whether or not the employee offers such factors in his own defense."

31. Plaintiff asserts also that the entire procedure whereby he was removed and the removal itself was in violation of the Regulations adopted by defendant Civil Service Commissioners to govern separations of federal employees such as the plaintiff herein, and more particularly it was in violation of 5 CFR § 9.101(b)(2), 5 CFR § 9.102 and 5 CFR § 9.106.

32. Plaintiff asserts further that the entire procedure whereby he was removed, the removal itself and the federal statutes and regulations relied on and as applied herein by defendants to brand and saddle plaintiff for life with the most serious and heinous stigma of immorality, violate the Fifth and Sixth Amendments to the Constitution of the United States in that plaintiff has been deprived of his position and the compensation and benefits he was lawfully entitled to receive therefrom without due process of law; he was twice put in jeopardy for the same alleged offence; and he was effectively denied the right to be confronted with the witnesses against him and to cross-examine same; and he was denied true and effective assistance of counsel for his defence.

33. Defendant Secretary of the Navy and his predecessor in that office have failed and refused to restore plaintiff to his position as a Fire Fighter at the Patuxent River Naval Base, Maryland and have, on the basis of the aforementioned unjust, unlawful, arbitrary and capricious procedures and decisions, prevented and continue to prevent plaintiff from performing his duties in the Government service, from retaining his position, his rights and preferences as such employee, and have deprived plaintiff of his salary and pay since the date of his discharge to the present time, and it is the plain ministerial duty of defendant Secretary of the Navy to reinstate plaintiff to his position with the Navy as of the date plaintiff was wrongfully removed therefrom.

34. The action of defendant Civil Service Commissioners in supporting and upholding plaintiff's separation from his position was unlawful, improper, arbitrary and capricious, in that the said Commissioners, their Board of Appeals and their regional staff knew or should have known that the Navy Department was following improper and unlawful policies and personnel practices and procedures when it discharged plaintiff as aforesaid, and that to uphold the said discharge did violence not only to the rights of plaintiff herein but to all federal employees similarly situated.

35. Plaintiff has exercised constant diligence in prosecuting his claim for retention as an employee of the Government up to and including the proceedings before the Civil Service Commission, which resulted in the Commission's final decision of May 24, 1963, and in the institution of this action for relief therefrom, but because of lack of funds to employ counsel of his own to bring this action, he was unable to proceed with the filing of this suit until his federal employee union, through its Legal Rights Committee and General Counsel, were finally authorized just recently to assist plaintiff in the prosecution of this action.

WHEREFORE, plaintiff prays:

1. That due process of this Court issue directing the defendants to appear and answer this Bill of Complaint.

2. That plaintiff have judgment against defendants fixing, declaring and determining his rights as an employee of the United States and directing that he is entitled to be reinstated in the position from which he was illegally removed.

3. That a mandatory injunction issue directed to defendant Paul H. Nitze, Secretary of the Navy, ordering him to restore plaintiff to his rightful position from which he was wrongfully and illegally removed.

4. That plaintiff be granted such other and further relief as to the Court may seem just and equitable in the premises.

(Signed) EDWARD L. MERRIGAN
Edward L. Merrigan
Attorney for Plaintiff
929 Pennsylvania Building
425 13th Street, N.W.
Washington 4, D. C.

Answer

Defendants by their attorney, the United States Attorney for the District of Columbia, on the basis of the certified U.S. Navy Department and U.S. Civil Service Commission administrative records, answer the complaint as follows:

FIRST DEFENSE

Plaintiff, a discharged civil service employee, has been guilty of such laches as should in equity bar him from maintaining this action for restoration to duty as a civilian employee with the Navy Department, in that (a) the Civil Service Commission's final decision on his appeal was entered on August 13, 1962; (b) the Commission's further decision denying his petition for discretionary reconsideration was entered on May 24, 1963; and (c) plaintiff instituted the present judicial review action on August 31, 1964—more than 2 years after the Commission's final denial of his appeal and about 1¼ years after the Commission's denial of his petition for discretionary reconsideration.

SECOND DEFENSE

Answering specifically the allegations of the complaint—

1.-4. Admit the allegations contained in paragraphs 1-4 of the complaint.

5. Admit that the Court has jurisdiction to conduct limited judicial review (on the basis of the certified administrative records) of the personnel actions taken in plaintiff's case, to determine whether they conformed to the governing law and regulations. Deny all further jurisdictional allegations contained in paragraph 5 of the complaint.

6.-17. Incorporate by reference the certified administrative records, and admit the allegations contained in paragraphs 6-17 of the complaint consistent with the facts as reflected in the certified administrative records.

18.-19. Deny that plaintiff was subjected to any intentional course of conduct designed to treat him "as a pariah" or to subject him to "continuous humiliation or disgrace." Deny that plaintiff was arbitrarily or capriciously assigned to work at a distant place.

20.-26. Deny that any of the actions taken in plaintiff's case was "patently frivolous, arbitrary and capricious", or was otherwise "arbitrarily, capriciously and unlawfully" taken. Incorporate by reference the certified administrative records, and admit the remaining allegations contained in paragraphs 20-26 of the complaint consistent with the facts as reflected in the certified administrative records.

27.-34. Deny that the procedures followed by the Navy Department in finally effecting plaintiff's removal were in any way defective, unlawful, or improper. Deny that there was any violation of the applicable Civil Service Regulations in plaintiff's case. Affirmatively aver that plaintiff's removal was effected in full accord with the Constitution, statutes and regulations. Affirmatively aver, also, that plaintiff is barred, by operation of the doctrine of exhaustion of administrative remedies, from raising any procedural issue, in view of his waiver of hearing on the second set of charges made against him by the Navy Department.

35. Deny that plaintiff has exercised proper diligence in respect of the institution of the present action for judicial

review. By way of affirmative averment, incorporate by reference the affirmative averments set forth above under "First Defense". And refer the Court to the certified administrative records for the complete facts developed on the record in relation to this judicial review matter.

/s/ DAVID C. ACHESON
David C. Acheson
United States Attorney

/s/ CHARLES T. DUNCAN
Charles T. Duncan, *Principal*
Assistant United States Attorney

/s/ JOSEPH M. HANNON
Joseph M. Hannon
Assistant United States Attorney

/s/ GIL ZIMMERMAN
Gil Zimmerman
Assistant United States Attorney

Plaintiff's Motion for Summary Judgment

Comes now the plaintiff herein who moves this Court for summary judgment in his favor on the ground that there exists no genuine issue as to any material fact and plaintiff is entitled to judgment as a matter of law. In support of this motion, plaintiff relies on the pleadings herein, the certified U.S. Navy Department and U.S. Civil Service Commission administrative records, and the certified copies of the record before the United States Court of Claims in the companion case entitled *George A. Connelly* v. *United States*, C. Cls. No. 108-65.

/s/ EDWARD L. MERRIGAN
Edward L. Merrigan
Attorney for Plaintiff
1700 Pennsylvania Avenue, N.W.
Washington, D. C.

Statement of Facts in Support of Plaintiff's Motion for Summary Judgment Pursuant to Local Rule 9 (h)

Plaintiff herein seeks a declaratory judgment and mandatory injunction against defendants Secretary of the Navy and Civil Service Commission declaring and determining his rights as an employee of the United States and declaring that he is entitled to be reinstated in the position from which he was illegally removed, and directing that he be reinstated to that position. The undisputed facts supporting plaintiff's motion for summary judgment herein are as follows:

1. Plaintiff is a citizen of the United States and a resident of Maryland.

2. Defendants are the Secretary of the Navy and members of the Civil Service Commission of the United States, and as such officers, they possess the power and authority necessary to reinstate plaintiff to the position from which he was removed upon the order or judgment of this Court in this action.

3. For a period of approximately *17 years* prior to May, 1961, plaintiff, a classified civil service employee of the United States, served as a Fire Fighter at the United States Naval Air Station, Patuxent River, Maryland. His grade, after 17 years of satisfactory service, was GS-4; and prior to his discharge, his record reflected no difficulties of any kind with his employer, the Navy.

4. On or about May 19, 1961, plaintiff received a notice of proposed removal from his position from the Commanding Officer of the Naval Station, which notice proposed to remove plaintiff on the basis of alleged *"immoral, indecent, notoriously disgraceful conduct"*. Said notice went on to state:

> "Specifically, you are charged with the commission of homosexual acts with Donald L. Etheridge, 549-76-46, SA, U.S.N.; Robert C. Morrill, 537-12-28, SR,

U.S.N. and William (n) Coyle, 479-95-21, AA, U.S.N., during the period of 1 January, 1961 to 1 May, 1961. It is considered that these acts reflect unfavorably on your suitability as a government employee and it is considered in the best interest of the government that you be removed from the employment rolls of the station.

"You are advised that you may reply personally and/or in writing to this notice and may furnish affidavits in support of your reply . . .

"During the notice period, you will be scheduled for work as usual."

5. In accordance with the provisions of this notice, plaintiff requested a formal hearing, which was held on May 31, 1961 before a Grievance Advisory Committee appointed by plaintiff's superiors at the Naval Air Station. A copy of the "minutes" of the said hearing is a part of the administrative record before the Court in this case.

6. At the outset of this hearing, plaintiff's counsel, who had just been retained to replace another attorney who was unable to attend, requested a short continuance in order to gain a better understanding of the charges and to marshal the evidence in support of plaintiff's case (*Minutes of Hearing*, pg. 1). This request was denied by the Committee (*Minutes*, pg. 1). Then, the Committee, without first receiving any evidence in support of the charges, directed plaintiff to present his defense (*Minutes*, pgs. 1, 2). This was in violation of the Navy's own Regulations, which specifically provide at NCPI 750 (Sect. 5.5(f)(2), entitled "*Hearings*"):

"In hearing cases . . . , the following standards and procedures shall be observed . . .

(2) The employee shall be advised of the charges and of the contemplated penalty. *The evidence in*

support of the charges will then be introduced. The evidence may be in the form of testimony of witnesses and participants and introduction of pertinent documents, materials and equipment . . . *Charges do not constitute evidence* . . .

(3) The employee shall be given full opportunity to reply and refute the evidence and charges against him *and to question all witnesses at the hearing* . . .

(4) The hearing officer or board shall make every effort to elicit all of the facts bearing on the case whether those facts support the charges or support the employee's position; *to confront the employer with the witnesses against him* if that is the employee's desire: to assure the employee's full understanding of all phases of the matter . . ." (Emphasis supplied)

7. At the hearing, however, the Grievance Committee appointed by the Navy expressly refused to conduct the case against plaintiff in accordance with the Navy's own Regulations. In this connection, the "Minutes" of the hearing before the Committee contain the following colloquy between plaintiff's representatives and the Committee Chairman (*Minutes*, pg. 2):

"*Dorsey:* It is my understanding that the accused has certain charges pending against him and, of course, we have no evidence to present if the government has none.

"*Chairman:* We dont intend to call any witnesses at this particular time.

"*Wells:* In other words, the accused will not hear the people accusing him of these acts and we are just merely assuming that they accused him. In other words, don't the accused have a right to be faced by the people accusing him and the right to question those people as to why they made these charges. In other

words, somebody can say anything they like about any of you or anybody else and accuse you, if you don't have a chance to question them.

"*Corely:* We have sworn statements. I understand you have witnesses to be called as character witnesses.

"*Wells:* Are you going to present the prosecution first?

"*Chairman:* This is not a court. We are just arriving at facts. We have some facts in our hands right now and we want other facts . . ."

8. Plaintiff was thereupon directed by the Committee to call his defense witnesses first, and he summoned a series of character witnesses—persons of high responsibility and position in the local area who had known plaintiff over a long period of years. All of these witnesses testified that plaintiff possessed a very good character and that he had a very high reputation in the community (*Minutes*, pg. 3 et seq.). The first of these witnesses, Mr. James Hammett, testified that he operated a service station "just outside the gate" at the Naval Station; that he had known plaintiff for 30 years as both a customer and friend; and that Mr. Connelly was a man of "good moral habits" (*Minutes*, pgs. 3, 4). Upon interrogation by plaintiff's attorney, Mr. Hammett testified:

"Q. Do you have any reason to believe that he has any homosexual tendencies?

A. No, sir, not to my knowledge.

Q. Are you familiar with his reputation in the community?

A. Yes, sir . . . I have never heard anything whatsoever referring to what you said from anyone . . . I have known him just about all my life."

9. Another witness called by the plaintiff, Mr. J. Loyd Bean, was one of plaintiff's co-workers at the Naval Station. He stated he had known plaintiff for 19 years (*Minutes*, pg. 4). He thereupon testified (*Minutes*, pg. 5):

> "Q. What is his reputation in the community?
> A. Very good.
> Q. He has been charged with committing homosexual acts. Do you know anything about his character that would lead you to believe that he had committed these acts?
> A. In my opinion, he wouldn't have.
> Q. What do you base your opinion on?
> A. He has always been a perfect gentlemen . . . He had always been of very good standing through the community and I have never heard anything said by anybody in this respect."

A third witness, Mr. J. Leroy McNey, appeared and testified he had known plaintiff for 30 years or more (*Minutes*, pgs. 5, 6). Mr. McNey stated that plaintiff enjoyed "an excellent reputation", and in response to questions by plaintiff's attorney, he testified (*Minutes*, pg. 6):

> "Q. Have you ever known him to exhibit any homosexual tendencies?
> "A. No, sir."

10. Plaintiff's counsel thereupon inserted in the record a series of written certificates from prominent citizens in the area, all of which stated that plaintiff had never displayed any homosexual tendencies of any kind. The President of the First National Bank of Leonardtown, Maryland stated:

> "I have been advised that George A. Connelly is charged with immoral, indecent and disgraceful conduct in that he allegedly committed homosexual acts with certain enlisted Naval personnel, and that he is

presently awaiting action to determine if he should be dismissed from Government employment.

"This will certify that I have known Mr. Connelly most of his adult life and that I am familiar with his reputation in the community. I know of no incidents which would reflect upon his character and certainly do not feel that he has homosexual tendencies.

"He enjoys an excellent reputation in the community as does his entire family. His honesty and integrity are unquestioned.

"Knowing Mr. Connelly, it is difficult to believe that he could or would be involved in such conduct."

11. The State's Attorney for St. Mary's County, Maryland also filed a certificate in the record stating:

"This will certify that I have known Mr. Connelly most of his adult life and that I am familiar with his reputation in the community. I know of no incidents which would reflect upon his character and certainly do not feel that he has homosexual tendencies."

12. Similar certificates, all denying that plaintiff is a homosexual, or otherwise immoral or indecent, were filed by the Sheriff of St. Mary's County; the Chairman of the St. Mary's County Liquor Board; an attorney, who was also a member of the Maryland State Roads Commission; and by a Deputy Sheriff of St. Mary's County. The last mentioned certificate stated:

"This is to certify that I . . . have known George A. Connelly for a period of 17 years. I have always found him to be sober and of good character.

"George has always been loyal to and the main source of support for his aged parents.

"To my knowledge his reputation in this community for peace and good order have always been above reproach."

13. And, finally, Mrs. Goldsborough, a neighbor of plaintiff's for approximately 30 years, appeared and testified in response to questions put by the Committee Chairman (*Minutes*, pg. 8):

> "A. I have lived in the area where he lives for 30 to 40 years and I have never known him to be anything but a perfect gentlemen . . . I pass his house when I go back and forth on my way to work and I see him two or three times a week. He takes care of his aged parents. His father is nearly blind and his mother has been in the hospital for the last three or four years and he is in the main support of his parents."

14. When plaintiff's counsel had completed the introduction of the foregoing testimony and written certificates, the Chairman of the Grievance Committee thereupon *directed* plaintiff himself to comment on the charges against him and to answer various questions concerning same (*Minutes*, pgs. 8-10). Plaintiff denied the charges.

15. The Committee Chairman thereupon directed the three Navy enlisted men named in the charges against plaintiff to appear and testify (*Minutes*, pg. 10).

The first, Donald L. Etheridge, appeared but *refused to testify* regarding any of the alleged charges against plaintiff (*Minutes*, pgs. 11, 12). His testimony was as follows (*Minutes*, pg. 11):

> "Q. When did you first meet Mr. Connelly?
>
> "A. I refuse to answer any further questions. Article 31.[1]
>
> "Q. Did Mr. Connelly perform any unnatural sex acts with you?
>
> "A. I stand under Article 31 . . .

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[1] Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, provides that no person in a Navy proceeding may be forced to give testimony which he believes may be self-incriminating.

"Q. Were you ever caught by anyone while engaged in an unnatural sexual act with Mr. Connelly, Mr. Etheridge?

"A. I am not going to say anyother word."

When plaintiff's counsel sought to interrogate the witness further, the Committee Chairman refused to allow him to proceed, stating: ". . . we are going to have to let Mr. Etheridge go . . . He is obviously not going to answer and since he is not, it is just useless to keep going on . . ." (*Minutes*, pg. 11). The Chairman made no effort whatsoever to compel or direct the witness, a Navy enlisted man, to testify.

16. The second alleged complainant, Robert C. Morrill, was thereupon called to testify. Morrill testified, first of all, that he had been in the Navy for less than 2 years and that he had been punished just a short time before for illegal possession of a Navy driver's license and for damaging private property (*Minutes*, pg. 12). For this offense, he had been reduced in rank (*Minutes*, pg. 13). But, when it came to the alleged charges against plaintiff, Morrill, like Etheridge, refused to testify (*Minutes*, pg. 13).

17. The third alleged complainant, William Coyle, was thereupon called to testify by the Committee. He stated he was only 20 years old; that he had been in the Navy only about a year and a half; and that, prior to his enlistment, he had "been through Juvenile Court . . . two or three times . . . for malicious destruction of property" and perhaps other offenses (*Minutes*, pg. 15). But, Coyle, like Etheridge and Morrill, absolutely refused to testify regarding the charges against plaintiff. He "refused to testify" because, in his words, he had "taken Article 31" (*Minutes* pg. 15).

18. The Chairman of the Grievance Committee thereupon insisted that plaintiff again take the witness chair and once more be interrogated by the Committee regarding

the charges against him (*Minutes*, pg. 17). In response to questions put by the Chairman, plaintiff testified as follows (*Minutes*, pg. 17):

> "Q. Did you commit any unnatural acts with any of these men?
> "A. No, sir . . .
> "Q. You say you did not commit any of these acts?
> "A. No, sir."

19. The Commmittee thereupon sought to determine from plaintiff why he (plaintiff) thought such charges would be made against him by the three Navy enlisted men if the said charges were not true. Plaintiff testified that one of the three men, Morrill, had admitted prior to the hearing *that he made those charges solely "So he would be released from the Navy"* (*Minutes*, pg. 17). And, of course, during his testimony before the Committee, Coyle, one of the other two complainants, *candidly admitted that he also had been trying to find a way to get out of the Navy* (*Minutes*, pg. 15).[2]

20. After plaintiff was excused as a witness for the second time, several of his fellow employees at the Naval Station were called to testify. Each testified favorably regarding plaintiff and his reputation over 17 years at the Station, *and all advised the Committee that there were no facts known to them which could possibly lead them to believe that plaintiff would commit any homosexual acts* (*Minutes*, pgs. 18-20).

21. Then, *after* the record was closed and *after* plaintiff's counsel had completed his closing argument and although the Navy's own Regulations (NCPI 750, 5-5 (f) (2)) specifically provides that "*charges do not constitute*

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[2] In other words, it appears from the record *without dispute or contradiction* that the three complainants were endeavoring to gain their release from the Navy; and because of the nature of their charges against plaintiff, all qualified for release as "undesirable", and were so released (*Minutes*, pg. 11).

evidence", the Chairman of the Navy Grievance Committee insisted upon reading into the record the written charges allegedly made against plaintiff by the three men who refused to testify before the Committee (*Minutes*, pgs. 23-25). The Chairman again turned to the plaintiff and insisted that he again answer the following questions regarding the charges read into the record as aforesaid (*Minutes*, pg. 25):

> "*Chairman:* Do you deny the contents of these statements?
>
> "*Connelly:* Yes, I do.
>
> "*Chairman:* Do you deny all, in part, or all of the statements?
>
> "*Connelly:* These are all untrue as far as I'm concerned."

22. Thereafter, and on or about June 6, 1961 and solely on the basis of the record referred to above, the Commanding Officer of the Naval Air Station (who was not a member of the aforementioned Committee) issued a final decision removing plaintiff from his position. The Commanding Officer stated:

> "At your hearing before the Field Grievance Advisory Committee on 31 May, 1961 statements of your associates in these acts were read to you and you were given ample opportunity to present evidence and to refute the charges against you. *It is considered that you failed to present such evidence or other explanation that would deny these statements.* It is, therefore, the final decision of this command that you be removed from the rolls of this station effective 9 June, 1961 . . ."

23. On June 8, 1961, plaintiff appealed from that decision to the Secretary of the Navy.

24. While the said appeal was pending, one of the Naval enlisted men, upon whose statements the Navy's charges

against plaintiff were based Robert C. Morrill—suddenly relented and released a written statement in his own handwriting, dated June 9, 1961, in which he admitted *all of his charges against plaintiff were false and concocted.*

25. Approximately 6 months later, the Secretary of the Navy sustained plaintiff's appeal on the ground that "the procedure followed in effecting your removal from employment was fatally defective". The Secretary ordered the Naval Air Station to restore plaintiff to duty.

26. Thereafter, on or about December 18, 1961, the Commanding Officer of the Air Station notified plaintiff in writing that in the event he desired to be restored to duty, he should report to the Security Officer on December 21, 1961 for reinstatement.

27. However, when plaintiff reported for duty in response to this letter, the commanding officers and supervisory personnel at the Station embarked upon a course of conduct whereby plaintiff was treated as a pariah and he was intentionally subjected to continuous humiliation and disgrace, as follows:

(i) First of all, he was denied a regular employee's permit, required by all employees for entry and departure at the Station. Rather, plaintiff was required to report to a special Security Post and from there he was escorted around the Station at all times by a guard.

(ii) Secondly, plaintiff was arbitrarily and capriciously assigned to work at a place far away from his old place of employment at the Naval Station itself; and while this place was only 14 miles from the Station by boat, and while all other employees so assigned were permitted to travel to and from this place of employment by boat, plaintiff was excluded from this privilege by his superiors on the ground that his presence on the boat would be embarrassing to his fellow employees. Plaintiff was accordingly required to travel alone 70

miles over land each day to and from this distant point in order to retain his employment. When plaintiff complained about this, his superiors mockingly referred to him as a "bachelor", and stated he shouldn't mind living alone at the distant location involved.

28. Thereafter, on January 26, 1962 and in further pursuit of the aforementioned program of harrassment and oppression directed at plaintiff herein, the Commanding Officer at the Naval Station caused to be served on plaintiff another Notice of Removal, *same being based substantially on the same old charges made against plaintiff by Coyle and Etheridge. The charges theretofore made by Morrill, who subsequently admitted in writing that same were false, were deleted from this notice.* Plaintiff was advised that "during the notice period you will be scheduled for work as usual".

29. Because the aforesaid notice was based substantially on the same old charges as those contained in the prior notice which had been rejected by the Secretary as defective and improper, *and because the only two complainants named in said second notice* (Coyle and Etheridge) *had steadfastly refused to testify or to be cross-examined regarding the said charges, and because through character witnesses, certificates and testimony of fellow employees, and through his own repeated denials under oath on the record, plaintiff had established, to the full extent of his ability, his innocence of the charges against him,* and since the aforesaid notice of removal, asserting substantially the same old charges in the face of the circumstances here involved, was so patently arbitrary and capricious on its face—*plaintiff elected simply to reiterate again his innocence of the charges and to stand on the testimony and certificates submitted during the first hearing proceeding;* and accordingly, he notified the Commanding Officer of the Naval Station as follows:

"... A hearing would serve no useful purpose as no new charges were presented, and I have already successfully answered the old charges.

"*In reply to your notice of proposed removal please be assured that I plead innocent to any and all charges stated and presumed in your letter* ... Your present disposition ... to redismiss me from service on an identical set of charges is an undisguised attempt to nullify the orders of higher echelon and a deliberate case of placing me in double jeopardy.

"I request that you see fit to put an immediate arrest to the illegal and improper personnel action which, if allowed to go through, threatens to jeopardize my interests ..." (Emphasis supplied)

30. Thereafter, and just one week later, on February 8, 1962, and without producing, exhibiting or referring to any new witness or evidence of any nature or kind against the plaintiff and in reliance exclusively on (a) *the old uncorroborated statements of Coyle and Etheridge and* (b) *the hearing record made in connection with the original set of charges*, the Commanding Officer of the Naval Air Station arbitrarily, capriciously and unlawfully again removed plaintiff from his position as an employee of the United States. In this decision, the Commanding Officer stated:

"I have considered your reply of 1 February, 1962, but have determined that your conduct was immoral, and that you did commit homosexual acts with Donald Lee Etheridge and William (n) Coyle as described in the advance notice and in their statements ... Therefore, it is my decision that your removal from the employment rolls of this station will be effected on 16 February, 1962. This action is being taken in the best interest of the federal service."

31. At the time plaintiff's commanding officer dismissed him (a) without producing any credible evidence of any kind to support the charges made against plaintiff by two men who refused to testify or to be cross-examined concerning said charges and who admittedly were bent on getting out of the Navy, and (b) in the face of plaintiff's categoric, repeated denials that he was guilty of these charges, and (c) in the face of the written confession of one of plaintiff's original accusers that the charges were false and concocted, the Navy's applicable Regulations provided as follows:

(i) NCPI 750, Section 2-3 (c)—

"A *prima facie case* against an employee must exist before disciplinary action is initiated. A *prima facie case* is one established by sufficient evidence to justify *a presumption of guilt* BEYOND REASONABLE DOUBT . . .

"It is management's responsibility to ascertain ALL pertinent facts *prior to making a final decision and to uncover and attach due weight to factors supporting the employee's position* WHETHER OF NOT THE EMPLOYEE OFFERS SUCH FACTORS IN HIS OWN DEFENSE". (Emphasis supplied)

(ii) NCPI 750, Section 5-5 (b)—

"Hearings shall be held whenever . . . the employee requests such hearing in reply to charges. *Hearings may be held, in the discretion of management, when the employee fails to request such hearing, if it is believed that hearing the case will lead to a better understanding of the case and more equitable action.*" (Emphasis supplied)

(iii) NCPI 750, Section 5-5 (f)—

"In hearing cases . . . the following standards and procedures *shall* be observed . . .

"(2) The employee shall be advised of the charges and of the contemplated penalty. *The evidence in support of the charges will then be introduced.* The evidence may be in the form of testimony of witnesses . . . and introduction of pertinent documents . . . *Charges do not constitute evidence* . . .

(3) The employee shall be given full opportunity to reply to and refute the evidence and charges against him and to question all witnesses at the hearing . . .

(4) The hearing officer or board shall make every effort to elicit all of the facts bearing on the case whether those facts support the charges or support the employee's position . . ." (Emphasis supplied)

32. Shortly after plaintiff received the Commanding Officer's letter of February 8, 1962, again dismissing him from his position with the Navy, plaintiff appealed to both defendants herein, the Secretary of the Navy and the Civil Service Commission.

33. On March 30, 1962, the Civil Service Commission's Third Region denied plaintiff's appeal, stating that the Commission had *no authority to review the "merits of the Navy's action"*. More specifically, the Commission's Third Region stated:

". . . The merits of the agency action including the sufficiency of the reasons given in the agency notices for the adverse decision, *were not for consideration in your case, being outside the Commission's authority.* Your recourse, if any, on such aspects of the action would be under administrative appeal procedures of the agency." (Emphasis supplied)

On August 13, 1962, the Commission's Board of Appeals and Review affirmed the decision of the Third Region, *again stating that the Commission had no authority to de-*

termine whether the charges against plaintiff were arbitrary or supported by substantial or believable evidence.

On May 24, 1963, defendant Civil Service Commission itself affirmed the decision of the Board of Appeals and Review, again without passing on the merits of plaintiff's case or whether his discharge by the Navy had been arbitrary, capricious and without support in the evidence.

34. In the meantime, defendant Secretary of the Navy likewise denied plaintiff's appeal, stating merely:

> "It is found that the action taken by the Commanding Officer of the U. S. Naval Air Station Patuxent River, was warranted under the circumstances."

35. Plaintiff, now without his job and without sufficient funds to prosecute actions in two courts for reinstatement and back pay, turned to his federal employee union for assistance. Under the procedures followed by the union in all such cases, plaintiff's local lodge had to appeal to the district vice-president of the union for such help. The vice-president, in turn, had to forward the request for legal assistance to the national president of the union, who, on December 3, 1963, requested the union's general counsel for an opinion. On April 17, 1964, after a detailed review of the pertinent papers and legal authorities, counsel rendered an opinion to the national president recommending that plaintiff be granted assistance in the filing and prosecution of the necessary actions here in this Court and in the Court of Claims. This recommendation had to be submitted to the National Executive Council of the Union, which did not approve same until June 16, 1964.

36. Thereafter, on August 31, 1964, this suit was filed. The defendant's Answer herein was not served and filed until January 4, 1965.

37. In the meantime, in the companion suit plaintiff filed in the Court of Claims for back pay, the Government, on

July 6, 1965, moved for summary judgment. Plaintiff cross-moved for summary judgment. Under the procedures which prevail in the Court of Claims, the cross-motions for summary judgment were assigned to a Commissioner of the Court for initial decision. On March 28, 1966, the Commissioner rendered an initial decision holding, on technical jurisdictional grounds under 28 U.S.C. 1500, that this Court, not the Court of Claims, should be the first to pass on the merits of plaintiff's claims.

38. Plaintiff filed a Request for Review with the Court of Claims itself, and before oral argument could be had on the Request, the Court entered an order remanding the case to the Commissioner for reconsideration.

39. On August 4, 1966, the Commissioner filed another initial decision substantially similar to the one filed in March, 1966. Another Request for Review was filed by plaintiff, and the case came on for argument before the Court of Claims on plaintiff's and defendant's cross-motions for summary judgment in January, 1967.

40. In light of the pending cross-motions for summary judgment in the related Court of Claims case and in order to endeavor to avoid duplicate proceedings on substantially the same questions in both this Court and the Court of Claims, counsel for plaintiff and defendant herein agreed several months ago to hold this suit in abeyance pending a decision on the merits in the Court of Claims action. However, during oral argument in January, 1967 before the Court of Claims, at least two of the Judges on that bench stated that, as a matter of comity and because the action here was filed before the action in that Court, they believed this Court should be permitted to pass first on the merits of this case, and counsel for plaintiff was urged to proceed promptly in this Court to obtain a decision on the merits of plaintiff's claim, with the understanding that the result here would govern the outcome of the Court of Claims back pay case also. Counsel for plaintiff there-

fore immediately prepared and filed the instant motion for summary judgment at a time when this case was about to be reached for trial on the Ready Calendar of this Court.

Respectfully submitted:

s/ EDWARD L. MERRIGAN
Edward L. Merrigan
Attorney for Plaintiff
1700 Pennsylvania Avenue, N.W.
Washington, D. C.

Defendants' Cross-Motion for Summary Judgment

Come now defendants by their attorney, the United States Attorney for the District of Columbia and move the Court for summary judgment in their favor on the ground that there is no litigable issues of fact, and defendants are entitled to judgment as a matter of law.

Incorporated into and made a part hereof are the following exhibits, identified as indicated:

Government Exhibit No.	Description
1	Certified Civil Service Commission records relating to plaintiff's case
2	Certified Department of Navy records relating to plaintiff's case
3	Civil Service Commission policy statement of February 25, 1966, as to the unsuitability for Government employment of persons who have engaged in homosexual acts

Government Exhibit No.	Description
4	Copy of affidavit of the Industrial Relations Officer, U. S. Naval Air Station, Patuxent River, Maryland, executed June 14, 1965, (original filed in *Connelly* v. *United States*, Ct. Cl. No. 108-65, plaintiff's companion suit for back pay).

In support hereof, defendants submit a statement of material facts and a memorandum of points and authorities.

/s/

.....

DAVID G. BRESS
United States Attorney

/s/

.....

JOSEPH M. HANNON
Assistant United States Attorney

/s/

.....

GIL ZIMMERMAN
Assistant United States Attorney

Defendants' Statement of Material Facts in Support of Cross-Motion for Summary Judgment

Preliminary Statement

This is a civil service employee discharge case. Plaintiff, a non-veteran, was discharged by the Department of the Navy from a position as a Fire Fighter at the United States Naval Air Station, Patuxent River, Maryland. He is here suing for reinstatement.[1] No litigable issues of fact are involved; the case presents solely questions of law for determination by the Court.

While there are here no factual issues triable by the Court, we present herein—for the Court's convenience and in general conformity with Local Rule 9(h)—the following statement of facts, as reflected in the certified records of the Civil Service Commission[2] and the Department of the Navy. Considering the limited scope of judicial review in employee discharge cases, in light of plaintiff's waiver (on advice of counsel, and for specified reasons) of hearing in the Navy's second discharge proceedings, we believe that the following constitute all the material facts in the case:

The Material Facts

1. Plaintiff, a non-veteran, was employed by the Department of the Navy as a Fire Fighter at the United States Naval Air Station, Patuxent River, Maryland.

2. The Navy in 1961 brought its first removal proceedings against plaintiff. Those proceedings proved abortive. Upon plaintiff's appeal under the Navy's Internal Griev-

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[1] Concurrently with this action, plaintiff is maintaining a suit in the Court of Claims, **Ct. Cl. No. 108-65, on this same claim.** He is there suing the United States, seeking back pay. The Court of Claims on January 27, 1967 suspended further proceedings in its case, pending this Court's disposition of the matter here. In this connection, see 28 U.S.C. 1500.

[2] Hereinafter referred to as the "Commission" or "CSC".

ance Appeal Procedure,[3] the Secretary of the Navy on December 1, 1961 determined that the procedure in those first removal proceedings was "fatally defective" and sustained the appeal.

3. In those first abortive Navy removal proceedings—

(a) On May 19, 1961 the Commanding Officer, Patuxent Naval Air Station served notice of charges upon plaintiff that his discharge was proposed on the ground that he had engaged in "immoral, indecent, and notoriously disgraceful conduct". Specifically, he was charged with the commission of homosexual acts with three young Navy enlisted men, Donald L. Etheridge, Robert C. Morrill, and William Coyle, during the period January 1 to May 1, 1961.

(b) Plaintiff requested and received a hearing on these charges under the Navy's Grievance Procedure before a Grievance Advisory Committee under the applicable Navy Regulation.[4]

(c) Plaintiff's counsel requested a postponement of the hearing because he had then been just recently retained by plaintiff and desired time to study the case. This request was denied by the Committee Chairman.

(d) Upon commencement of the hearing, the Committee Chairman read the notice of proposed removal, and indicated that the Committee did not intend to call any witnesses at that time. The Navy's Employees Relations representative stated that "we have sworn statements". In

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[3] The governing Navy Regulation in effect at all times relevant to this litigation was Navy Civilian Personnel Instructions ("NCPI") 750; pertinent excerpts therefrom are included in Government Exhibit 2. The right to appeal through the Navy's Internal Grievance Appeal Procedure was provided for by NCPI 750.5-3(e).

[4] It was provided by NCPI 750.5-3(c)(5) that the notice of charges "advise the employee that he will be granted a hearing, upon request, and [at such hearing] may have representation and witnesses as specified in NCPI 750.5-5."

reply to inquiry of plaintiff's counsel, the Chairman made it clear that the Navy's evidence supporting its charges would not be required to be presented first.[5]

(e) The subsequent course of events at the hearing, leading to the Navy's introduction into evidence in these first Navy removal proceedings of the sworn statements (in affidavit form) of Etheridge, Morrill and Coyle, was as follows:

(i) Plaintiff presented character evidence in his own behalf (in the form of testimony and letters attesting to his general good character). The Committee Chairman then read certain portions of these affidavits to plaintiff, and interrogated him concerning an incident in which Etheridge had threatened plaintiff with bodily harm at the fire station, and as to whether plaintiff knew Morrill and Coyle. At this point, the Committee Chairman directed that the three enlisted men be called to "record what they have to say here."[6]

(ii) Upon being called, Etheridge and Coyle declined to answer questions concerning their participation with plaintiff in unnatural sex acts, invoking their "Article 31" privilege against self-incrimination;[7] Morrill also declined to answer like questions, but did not invoke any privilege.

(iii) Plaintiff denied having committed any unnatural sexual acts with these enlisted men. Witnesses testified on

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[5] NCPI 750.5-5f(2) provided that at the hearing: "The employee shall be advised of the charges and of the contemplated penalty. The evidence in support of the charges will then be introduced."

[6] NCPI 750.5-5e provided that at the hearing: "Witnesses under the jurisdiction of the command holding the hearing shall be required to attend. Witnesses from without the activity shall be invited to attend the hearing, and every reasonable effort should be made to provide for their presence. [But] when this is not possible, depositions or affidavits as * * * [provided in NCPI 750.5-5f(2)] * * * may be submitted."

[7] Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, affords a privilege against self incrimination in Navy proceedings akin to that provided by the Fifth Amendment to the Constitution.

his behalf concerning their having heard Etheridge threaten plaintiff; but they acknowledged that they had no knowledge as to the circumstances leading to Etheridge's action. The Committee Chairman then read into the record, in their entirety, the affidavits adverse to plaintiff which Etheridge, Morrill and Coyle had previously executed, under waiver of their "Article 31" privilege against self-incrimination.[8]

(f) Upon his review of the proceedings, the Commanding Officer, Patuxent Naval Air Station, found the charges sustained. Plaintiff was discharged effective June 9, 1961. It was this discharge action which the Secretary of the Navy on December 31, 1961 voided for procedural deficiency.

4. The Secretary of the Navy's notice of December 1, 1961 advising plaintiff that his appeal had been sustained, further informed plaintiff that the Commanding Officer, Patuxent Naval Air Station, was being requested to offer him restoration to duty. This notice added[9]:

> For your information, should you accept restoration to duty, *new and procedurally correct action* to remove you may be initiated upon your return to duty. [Emphasis supplied.]

Acting under this notice, plaintiff chose to accept restoration. He resumed active duty on December 22, 1961, and received back pay for the period of his removal. In this

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[8] NCPI 750.5-5f(2) provided that "where necessary, affidavits or depositions may be used [as evidence at the hearing], with the employee being allowed a reasonable time in which to obtain counter affidavits or depositions."

[9] NCPI 750.6-4(b) provided that "when a * * * removal action is found to be procedurally defective, a new and procedurally correct action may be initiated against the employee." The memorandum from the Secretary of the Navy to the Commanding Officer, Patuxent Naval Air Station, specifically called attention to NCPI 750.6-4 and repeated its authorization to "initiate new and procedurally correct action" to remove the employee after he had been "restored to duty on a finding of procedural defect."

manner, the Navy's first removal proceedings in plaintiff's case were rendered void *ab initio*.

5. On January 25, 1962 the Commanding Officer, Patuxent Naval Air Station, commenced new proceedings to remove plaintiff by serving upon him a new, detailed, notice of charges. In this new notice, plaintiff was informed that it was proposed to remove him for "the commission of homosexual acts, which, if true, would constitute immoral conduct". The specifications charged plaintiff with the commission of two homosexual acts with Etheridge, and five homosexual acts with Coyle.[10] Incorporated into (and served with) this new notice of charges of January 25, 1962 were one affidavit executed by Etheridge and two affidavits executed by Coyle. These detailed the seven unnatural sex acts, which the specifications in the second notice charged, plaintiff had committed with Etheridge and Coyle.

6. The second Coyle affidavit was executed by him on July 12, 1961. This was subsequent to the date (May 31, 1961) of the hearing in the Navy's first abortive removal proceedings, at which Coyle had invoked his "Article 31" privilege against self-incrimination. In this second affidavit, Coyle waived his "Article 31" privilege and averred: On June 14, 1961 plaintiff had tried to get Coyle to repudiate his earlier affidavit, and also to attempt to prevail on Etheridge also to retract his affidavit. In doing so, plaintiff showed Coyle the "statement that * * * Morrill had made for him [plaintiff] declaring a lie that he [Morrill] had given the Navy."[11] If Coyle did this for plaintiff, plaintiff stated, he "would make it well worth * * * while" for Coyle. Coyle told plaintiff that he (Coyle)

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[10] Before the Navy began its second removal proceedings in plaintiff's case, Etheridge and Coyle had been, themselves, separated from the Navy. Hence, the new notice of charges referred to them as former Navy enlisted men.

[11] Since Morrill had repudiated the statements in his affidavit, the Navy did not include in its new notice of charges any specifications as to plaintiff having engaged in unnatural sexual acts with Morrill.

"was not interested." They then "went to a couple of bars". Thereafter, plaintiff and he "drove around for a while" in plaintiff's automobile. After conversation in a homosexual vein, plaintiff participated with him (Coyle) in an unnatural sex act, and gave him (Coyle) two dollars. A specification in the new notice of January 25, 1962 charged plaintiff with the commission of this fifth unnatural sexual act with Coyle on June 14, 1961. (No like specification had been made in the Navy's first abortive removal proceedings.)

7. In the new notice of charges dated January 25, 1962 the Commanding Officer advised plaintiff that he might "reply personally and or in writing" to the charges and "furnish affidavits in support of" his reply. He was further advised that he could "request a formal hearing at which * * * [he might] * * * be represented by any two persons of * * * [his] * * * choice and * * * call a reasonable number of witnesses." By letter dated January 30, 1962 plaintiff requested such a hearing on the new charges, and stated that he would advise "at a later date" who would represent him at that hearing.

8. However, by letter dated February 1, 1962 plaintiff retracted this request for hearing, stating that he was doing so under legal advice and furnished the name of his attorney. He then expressly gave two reasons for waiving the hearing, to which he was entitled, on request, under the governing Navy Regulation.[12] His stated grounds were: (1) that "a hearing would serve no useful purpose as no new charges were presented, and * * * [he] * * * [he had] * * * already successfullly answered the old charges"; and (2) that the new proceedings "to re-dismiss * * * [him] * * * from service on an identical set of charges is an undisguised attempt to nullify the orders of higher echelon and

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12 See fn. 4 *supra*.

a deliberate case of placing * * * [him] * * * in double jeopardy." [13]

9. In light of this express waiver by plaintiff of his right to a hearing, on advice of counsel and for these stated reasons, the Navy was entitled under the governing regulation to accept, and did accept, as competent evidence in its second removal proceedings the sworn statements adverse to plaintiff made by Etheridge and Coyle in their affidavits.[14] These statements essentially supplied the factual basis for discharge. The Commanding Officer, Patuxent Naval Air Station, concluded on his review of the record in the second removal proceedings that plaintiff had engaged in the unnatural sexual acts with Etheridge and Coyle, as charged; that such homosexual acts constituted "immoral conduct" within the meaning of the Navy Regulations; and that plaintiff's removal on this ground was in the "best interests of the service."

10. The final decision of the Commanding Officer was entered in these second Navy removal proceedings on February 8, 1962. Plaintiff was discharged thereunder on February 16, 1962. The Commanding Officer's decision notified plaintiff of his right of appeal to the Civil Service Commission on grounds of procedural deficiency[15]; that, if

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[13] As we point out in our memorandum of points and authorities, these stated grounds were invalid.

[14] See fn. 6 *supra*. Under NCPI 750.515(e) and f(2), if plaintiff had insisted upon a hearing, the Navy would have been obliged to make every reasonable effort to secure the presence of Etheridge and Coyle as witnesses at the hearing. This is not simply a case of failure to request a hearing by an uninformed employee, acting without advice; here, plaintiff expressly waived hearing, on advice of counsel, and for specified reasons. See fn. 19 *infra*.

[15] The CSC Regulations in effect during all times pertinent to this litigation, governing the discharge of non-veterans from positions in the competitive civil service, appeared in 5 C.F.R., Part 9, as revised effective February 10, 1961, published 26 F.R. 181-183 and in the Cum. Supp. as of January 1, 1962. Insofar as material here, the regulations conferred on a non-veteran the right to appeal to the Commission on grounds of procedural deficiency only; the "merits" (i.e., the sufficiency of the agency's grounds for discharge) were not open for Commission review. 5 C.F.R. 9.301(a).

on such appeal, the Commission decided the matter adversely to him, he could then appeal through the Navy's Grievance Appeal Procedure; but that the Navy then would not consider any aspect of the matter appealed to and affirmed by the Commission.[16]

11. Plaintiff appealed to the Commission, claiming that the Navy's January 25, 1962 notice of charges had been deficient "in terms of details and specificity." In his representative's letter of March 19, 1962, plaintiff noted that the Navy's case against plaintiff rested on the "sworn statements" of its witnesses, and contended that plaintiff "needed further particulars" than appeared in their affidavits in order "to attack their truthfulness and enter into an intelligent defense." Abandoning one of the reasons he had originally advanced before the Navy as the basis for rescinding his request for a hearing, he stated:

> We do not dispute the observation made by the Secretary of the Navy that the employing activity could initiate procedurally correct action despite his dismissing the case once for procedural infirmity * * *.

He then went on to modify his remaining reason for withdrawing his request for a hearing, by stating the following:

> Upon advice received [from counsel] appellant [plaintiff] cancelled his request for a formal hearing a second time. The charge against him not being in consonance with that required under the Civil Service Regulations or the Navy's Civilian Personnel Instructions, the appellant didn't see any reason in making a second defense against the same charges, written exactly in the same manner, as before. [Bracketed material supplied.]

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[16] The governing Navy Regulations provided that any issues previously entertained by the Commission under its own proper statutory authority would not be considered in the appeal under the Navy's Internal Grievance Appeal Procedure. NCPI 750.5-3g.

12. The final decision[17] on plaintiff's CSC appeal was entered by the Commission's Board of Appeals and Review on August 13, 1962. The Board denied the appeal and ruled adversely to plaintiff's claim, as follows:

> As a result of its consideration, the Board finds, as did the Philadelphia Regional Office, that the reasons for the proposed removal were set forth in the Commanding Officer's letter [of charges] of January 25, 1962, and its attachments [the affidavits of Etheridge and Coyle], with sufficient specificity and detail to give * * * [plaintiff] * * * an adequate understanding of the charges against him and to provide him a fair opportunity for refutation. * * *. [Bracketed material supplied.]

13. Plaintiff then filed his appeal under the Navy's Internal Grievance Appeal Procedure on August 21, 1962. He then merely requested "further consideration on the merits", without specifying any particular grounds therefor. The Secretary of the Navy on October 12, 1962 entered the Navy's final decision in the matter. He "found that the [discharge] action taken by the Commanding Officer of the U. S. Naval Air Station, Patuxent River, was warranted under the circumstances", and denied plaintiff's appeal "on the merits."

14. Subsequently, on March 4, 1963, plaintiff petitioned the CSC Commissioners, in the exercise of their discretionary authority,[18] to reopen and reconsider the final CSC decision entered in his case on August 13, 1962 by the Board of Appeals and Review. Essentially, plaintiff rested his

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[17] The CSC Regulations then provided that "the Board's decision on appeal shall be final", and that "there is no further right of appeal." 5 C.F.R. 9.306.

[18] Under 5 C.F.R. 9.307, the Commissioners reserved discretionary authority to, at any time, reopen and reconsider "any previous decision" of the Commissioners whenever "in their judgment such action appears warranted by the circumstances."

petition on *Williams* v. *Zuckert*, then recently decided (on January 14, 1963) by the Supreme Court.[19] The Commissioners on May 24, 1963 determined that "the current representations fail to demonstrate probable error in the decision of the Board of Appeals and Review and, accordingly, the request for reopening of * * * [the] * * * appeal is denied." The Commissioners added: "The Board's decision of August 13, 1962, remains as the final decision of the Civil Service Commission in the matter, and * * * [plaintiff's] * * * administrative remedies in the * * * Commission on his appeal under former Part 9 of the Commission's Regulations were exhausted with the issuance of that decision."

15. The official Government policy in respect of the unsuitability or unfitness for Government employment of persons who have engaged in homosexual acts, was publicly announced by the Commission on February 25, 1966, and made generally available on April 20, 1966. It appears in full in Government Exhibit 3 (which is a certified copy of this policy statement). That full policy statement is incorporated herein by reference.

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[19] 371 U.S. 531. There, it was held that where an agency is relying upon affidavits which "supplied the factual basis" for its discharge action, and the governing regulations provide the employee the opportunity, on request, to cross-examine the witnesses at a hearing, it is incumbent upon the employee to make "proper and timely request" upon the agency to produce the affiants at the hearing. Only upon such a "proper and timely request" is the agency required to produce them pursuant to the regulations, if they are readily available and under the agency's control. 371 U.S. at 532-533. Subsequently, on petition for rehearing, the Supreme Court remanded the case for resolution of the conflicting factual contentions advanced before that Court, in order to have it determined whether the employee had discharged "his initial burden" under the regulations "by making timely and sufficient attempt to obtain" the witnesses' presence at the hearing, or, if, "under the circumstances and without fault of his own", he was "justified in failing to make such attempt", whether he then had made "proper and timely demand" on the agency, "so that it was required" under the regulations "to produce * * * [the] * * * witnesses for cross-examination." 372 U.S. 755 (1963).

16. In view of plaintiff's long delay in instituting suit, defendants are asserting that laches is a "threshold" bar to maintenance of this action. The complaint herein was filed on August 31, 1964; the companion suit, seeking back pay, was later initiated in the Court of Claims on April 5, 1965. By affidavit (Government Exhibit 4), the Civilian Personnel Officer, Patuxent Naval Air Station, has certified that the position from which plaintiff was discharged on February 16, 1962 has been filled continuously since June 2, 1962. Plaintiff seeks to excuse his long delay on the ground of an unspecific claim of "lack of funds", and consequent (alleged) dependence on his union to prosecute his claim in this Court and the Court of Claims. He was originally represented before the Navy by private counsel; the union's representatives acted on his behalf before the Commission.

/s/
DAVID G. BRESS
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
GIL ZIMMERMAN
Assistant United States Attorney

Defendants' Statement in Opposition to Plaintiff's Motion for Summary Judgment, Pursuant to Local Rule 9(h)

Come now defendants by their attorney, the United States Attorney for the District of Columbia in opposition to plaintiff's motion for summary judgment.

As noted in our statement of material facts, there are no litigable issues of fact here; this employee discharge matter is to be determined by the Court on limited review of the certified records of the Civil Service Commission and the Department of the Navy. Nevertheless, in order to avoid any possibility the Court may assume—under the third paragraph of Local Rule 9(h)—that defendants do not controvert plaintiff's statement of facts in support of his motion for summary judgment, defendants state the following:

1. *Re par. 15 of plaintiff's statement.* Donald L. Etheridge, when called as a witness at the May 31, 1961 hearing held in the Navy's first abortive removal proceedings in plaintiff's case, then also testified (in substance):

He had been in the Navy since August 1960. He had volunteered for a four year enlistment. He asserted: "I want to stay in [the Navy] if I can. I will fight to stay in every way I can." Before he got involved with plaintiff, he had never been in any trouble in or out of service.

The affidavit Etheridge executed on April 18, 1961 further discloses that: At the time he became involved with plaintiff, Etheridge was 18 years of age. Plaintiff solicited him to participate, and he did participate with plaintiff, in two homosexual acts for money. Plaintiff continued to call him thereafter. When Etheridge borrowed $13.00 from plaintiff, plaintiff told Etheridge "not to worry about paying him back, that he [plaintiff] would get it back another way." But then plaintiff "kept calling" Etheridge, and Etheridge "kept hanging up on him". Plaintiff went to see the Chief in Charge at the Hobby Shop. The Chief told

Etheridge "to give him [plaintiff] his money back." And Etheridge did so.

2. *Re par. 17 of plaintiff's statement.* William Coyle, when called as a witness at the May 31, 1961 hearing held in the Navy's first abortive removal proceedings in plaintiff's case, then also testified (in substance):

He had been in the Navy since November 30, 1959. He had volunteered for a four year enlistment. At the time of the hearing, he was "not now, not especially" trying to get out of the Navy before his enlistment was up. At an earlier time, he had tried to get out of the Navy; there had been "hardship difficulties" at his home; and he had then "put in a request that was denied." At the time of the hearing it no longer mattered "one way or the other" whether he stayed in the Navy.

While in the Navy, he had never been "up to Captain's Mast" at any time for disciplinary reasons. He had served his entire tour of duty (after boot camp) at the Patuxent Naval Air Station.

Before entering the Navy, he had been "through juvenile court * * * two or three times." But he had never been placed on probation, nor under the supervision of a parole officer, nor sent to a juvenile home. He had *not* been in juvenile court for larceny. When questioned in that regard, he stated: "I was in there once for, let's see, malicious destruction of property. I am not too sure what it all was [about]."

The affidavit Coyle executed on May 12, 1961 further discloses that Coyle participated with plaintiff in four homosexual acts for money. His later affidavit of July 12, 1961 discloses that he participated with plaintiff in a fifth homosexual act for money on the night of June 14, 1961, some two weeks after the May 31, 1961 hearing was held in the Navy's first abortive removal proceedings in plaintiff's case.

3. *Re par. 19 of plaintiff's statement.* Coyle was *not* "trying to find a way to get out of the Navy" either on May 12, 1961 when he executed his first affidavit against plaintiff, or on May 31, 1961 when he testified at the hearing in the Navy's first abortive removal proceedings in plaintiff's case. (See par. 2 *supra.*) Etheridge never was endeavoring to gain his release from the Navy. He asserted that he wanted to stay in the Navy if he could. (See par. 1 *supra.*)

4. *Re par. 21 of plaintiff's statement.* Near the close of the May 31, 1961 hearing, the Chairman of the Navy Grievance Committee read the affidavits of the three young Navy enlisted men into the record for evidentiary purposes. These statements were evidentiary, not simply "written charges", as plaintiff claims.

5. *Re pars. 27-28 of plaintiff's statement.* Plaintiff's claim that he was "treated as a pariah, etc." is irrelevant and immaterial. In any event, it appears to have no basis in fact; see enclosures 6-8 included in the certified records of the Department of the Navy. If material, we traverse this claim.

6. *Re pars. 28-30 of plaintiff's statement.* Plaintiff's several allegations to the effect that the January 25, 1962 notice of charges commencing the Navy's second removal proceedings in plaintiff's case contained no new specification of homosexual conduct are incorrect. Further, he inaccurately recites the record as to the reasons he gave, under advice of counsel, for deliberately waiving his right to hearing (with the concomitant right to cross-examine the accusatory witnesses thereat) in the Navy's second removal proceedings.

7. *Re par. 31 of plaintiff's statement.* Plaintiff is incorrect in his legal conclusions that there was no credible evidence in the record to sustain his discharge, and that the governing Navy Regulation was violated in the Navy's second removal proceedings in his case.

8. *Re par. 40 of plaintiff's statement.* Defendant's counsel never agreed with plaintiff's counsel that the action in this Court be held "in abeyance pending a decision on the merits in the Court of Claims action", which plaintiff has been maintaining contemporaneously with the action in this Court.

/s/
DAVID G. BRESS
United States Attorney

/s/
JOSEPH M. HANNON
Assistant United States Attorney

/s/
GIL ZIMMERMAN
Assistant United States Attorney

Judgment

This cause having come before the Court on the parties' cross-motions for summary judgment; counsel having been heard; and the Court having considered the records, and being fully advised in the premises,

It is this 14th day of April, 1967, ORDERED, ADJUDGED and DECREED:

(1) That defendants' cross-motion for summary judgment be, and hereby is, granted;

(2) That plaintiff's motion for summary judgment be, and hereby is, denied; and

(3) The action is hereby dismissed.

/s/ JOSEPH C. MCGARRAGHY
United States District Judge

Notice of Appeal

Notice Is Hereby Given this 12th day of May, 1967 that plaintiff, George Connelly, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order entered in this action on April 14, 1967 dismissing the action, denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment.

s/ Edward L. Merrigan
Edward L. Merrigan
Attorney for Plaintiff
1700 Pennsylvania Ave., N.W.
Washington, D. C. 20006

BRIEF ON BEHALF OF APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,085

GEORGE A. CONNELLY, *Appellant,*

v.

SECRETARY OF THE NAVY, ET AL., *Appellees.*

On Appeal From an Order of the United States District Court for the District of Columbia

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EDWARD L. MERRIGAN
Attorney for Appellant
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QUESTIONS PRESENTED

1. Under the facts of this case, did the District Court have the power to review appellant's discharge and to rule that same was unlawful, in violation of the Navy's own regulations, arbitrary, capricious, and without support in the evidence? Stated another way, in the light of the facts of this case wherein the Navy discharged appellant in complete violation of its own regulations and procedures, was it proper for the District Court to refuse to reinstate appellant to his position without stating any reason, conclusion, opinion, or legal precedent to support its decision?

2. In light of prior decisions of the Supreme Court and this Court, and specific written instructions provided by the Navy to appellant's Commanding Officer in this matter, were the charges levelled against appellant in this case sufficiently specific to provide appellant a fair opportunity to defend against same?

3. Was it proper for the Navy to discharge appellant from his position on the basis of a final dismissal notice predicated entirely on unexplained, unsupported charges of "*immoral conduct*" and such vague and obscure labels as "*homosexual acts*" and "*homosexual conduct*"?

4. Was it proper for the Navy to discharge appellant from his position without alleging, proving or asserting in any manner any legitimate relationship between the charges against appellant and his occupational duties, qualifications and efficiency as a Fire Fighter—a position he satisfactorily performed for 17 years prior to discharge?

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On Appeal From an Order of the United States District Court for the District of Columbia

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BRIEF ON BEHALF OF APPELLANT

THE FACTS

This appeal results from an Order of the District Court (Judge McGarraghy) dated April 14, 1967, pursuant to which appellant's complaint for reinstatement to his position as a Fire Fighter at the United States Naval Air Station, Patuxent River, Maryland, was summarily dismissed, appellees' motion for summary judgment granted

and appellant's motion for the same relief denied—*all without the expression of any written opinion of any kind, without any findings of fact or conclusions of law, and without the assignment of any reasons or legal precedents to support the District Court's opinion* (J.A. 55).

As set forth hereinbelow, appellant honestly believes that the District Court's said order is erroneous and wrong. In the meantime, however, that unexplained order has left appellant in an exceedingly dark, hopeless and unjust position where, *after 17 years of completely satisfactory service as a Fire Fighter for the Navy*, he has been stigmatized for life, separated from his job, his source of support, and he has been compelled to try to continue to live in the relatively small community of Leonardtown, Maryland, (where he has resided for decades) in an atmosphere of disgrace and dishonor. This appeal, therefore, is urgently essential and important to appellant, and he prays that this Court, after patiently, fairly and carefully reviewing the record herein, will conclude that his discharge from the Navy was arbitrary, capricious and unlawful; and that appellant should be restored to the position from which the Navy twice improperly removed him, in violation of its own regulations and prior decisions of this Court and of the Supreme Court of the United States.

The basic facts surrounding this case are as follows: For a period of approximately 17 years prior to May, 1961, appellant, a classified civil service employee of the United States, served as a Fire Fighter at the United States Naval Air Station, Patuxent River, Maryland (J.A. 22). His grade, after 17 years of satisfactory service, was GS-4; and prior to the discharge involved in this case, his record reflected absolutely no difficulties of any kind with his employer, the Navy (J.A. 22). Indeed, he was a model federal employee in every respect.

On or about May 19, 1961, however, appellant received a notice of proposed removal from his position as a Fire

Fighter. (J.A. 22). That notice proposed to discharge him on the basis of alleged "immoral, indecent, notoriously disgraceful conduct" (J.A. 4, 22, 42). Said notice went on to state (J.A. 22):

> "Specifically, you are charged with the commission of homosexual acts with Donald L. Etheridge, 549-76-46, SA, U.S.N.; Robert C. Morrill, 537-12-28, SR, U.S.N. and William (n) Coyle, 479-95-21, AA, U.S.N. during the period of 1 January, 1961 to 1 May 1961. It is considered that these acts reflect unfavorably on your suitability as a government employee and it is considered in the best interest of the Government that you be removed from the employment rolls of the station . . .
>
> "During the notice period, you will be scheduled for work as usual."

In line with instructions contained in the Navy's said Notice, appellant filed a written answer denying these charges and he requested a hearing (J.A. 23). The Commanding Officer of the Air Station thereupon appointed a Grievance Advisory Committee to conduct the said hearing, which was held on May 31, 1961 (J.A. 23)[1].

Shortly after the said hearing was called to order, the Committee, without first receiving any evidence whatsoever in support of the charges against appellant, *directed appellant to present his defense* (J.A. 23). This was in violation of the Navy's own regulations (NCPI 750, Sect. 5.5 (f) (2)), which specifically provided that "Charges do not constitute evidence . . .", and, at all grievance hearings, "The evidence in support of the charges will be introduced". Appellant's objections, however, were denied, and appellant was thus required to proceed with his witnesses and evidence against the pending charges (J.A. 23).

Appellant, faced with this outrageous predicament, thereupon did all he possibly could to defend himself.

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[1] The "minutes" or transcript of this hearing is one of the typewritten, xeroxed exhibits before this Court (See Appellant's Exhibit 3).

First, he summoned a series of character witnesses—persons of high responsibility and good standing, both in the local area and at the Naval Station, who had known appellant over a long period of years (J.A. 25). All of these witnesses testified that appellant possessed the best possible reputation in the community *and that he positively was not possessed of any "homosexual" tendencies or record of any kind* (J.A. 25, 27). One of these witnesses, a man who operated a service station "just outside the gate" at the Naval Station, testified he had known appellant as both a customer and friend for 30 years; that appellant was a man of "good moral habits"; and then he went on to testify as follows (J.A. 25):

> "Q. Do you have any reason to believe that he has any homosexual tendencies?
> "A. No, sir, not to my knowledge.
>
> "Q. Are you familiar with his reputation in the community?
> "A. Yes, sir . . . I have never heard anything whatsoever referring to what you said from anyone . . . I have known him just about all my life . . ."

Another witness called by appellant had worked with him as a Navy Fire Fighter for a long period of years (J.A. 26). He testified (J.A. 26):

> "Q. He has been charged with committing homosexual acts. Do you know anything about his character that would lead you to believe that he had committed these acts?
>
> "A. In my opinion, he wouldn't have.
>
> "Q. What do you base your opinion on?
>
> "A. He has always been a perfect gentleman . . . He had always been of very good standing through the community and I have never heard anything said by anybody in this respect."

A third witness thereupon appeared and testified he had known appellant for 30 years or more (J.A. 26). This

witness stated appellant enjoyed "an excellant reputation", and he too denied that appellant was in any sense "homosexual" (J.A. 26).

Appellant thereupon inserted in the record before the Navy Committee a series of written certificates from prominent citizens in the area, all of which stated appellant *had never* displayed any homosexual tendencies of any kind. The President of the First National Bank of Leonardtown, Maryland, whereat the Naval Station is located, stated (J.A. 26):

> "I have been advised that George A. Connelly is charged with immoral, indecent and disgraceful conduct in that he allegedly committed homosexual acts with certain enlisted Naval personnel, and that he is presently awaiting action to determine if he should be dismissed from Government employment.
>
> "This will certify that I have known Mr. Connelly most of his adult life and that I am familiar with his reputation in the community. I know of no incidents which would reflect upon his character and certainly do not feel that he has homosexual tendencies.
>
> "He enjoys an excellent reputation in the community as does his entire family. His honesty and integrity are unquestioned.
>
> "Knowing Mr. Connelly, it is difficult to believe that he could or would be involved in such conduct."

The State's Attorney for St. Mary's County, Maryland, wherein the Naval Station is located, also filed a certificate in the record stating (J.A. 27):

> "This will certify that I have known Mr. Connelly most of his adult life and that I am familiar with his reputation in the community. I know of no incidents which would reflect upon his character and certainly do not feel that he has homosexual tendencies."

Similar certificates, all denying that appellant is a homosexual, or otherwise immoral or indecent, were filed by the

Sheriff of St. Mary's County; the Chairman of the St. Mary's County Liquor Board; an attorney, who was also a member of the Maryland State Roads Commission; and by a Deputy Sheriff of St. Mary's County (J.A. 27). The last mentioned certificate stated (J.A. 27):

> "This is to certify that I . . . have known George A. Connelly for a period of 17 years. I have always found him to be sober and of good character.
>
> "George has always been loyal to and the main source of support for his aged parents.
>
> "To my knowledge his reputation in this community for peace and good order have always been above reproach."

And, finally, Mrs. Goldsborough, a next-door neighbor of appellant's for approximately 30 years, appeared and testified in response to questions put by the Committee Chairman (J.A. 28):

> "A. I have lived in the area where he lives for 30 to 40 years and I have never known him to be anything but a perfect gentleman . . . I pass his house when I go back and forth on my way to work and I see him two or three times a week. He takes care of his aged parents. His father is nearly blind and his mother has been in the hospital for the last three or four years and he is the main support of his parents."

When appellant had completed the introduction of the foregoing testimony and written certificates, the Chairman of the Grievance Committee thereupon *directed* appellant himself to testify regarding the charges against him and to answer various questions concerning same (J.A. 28). *Appellant answered all such questions, but steadfastly denied the charges.*

The Committee Chairman thereupon finally directed the three Navy enlisted men named in the charges against plaintiff to appear and testify (J.A. 28).

The first, Donald L. Etheridge, appeared but *refused to testify* regarding *any* of the alleged charges against appellant (J.A. 6, 28). His testimony was as follows (J.A. 28; Appellant's Exhibit 3):

> "Q. When did you first meet Mr. Connelly?
> "A. I refuse to answer any further questions. Article 31.[2]
>
> "Q. Did Mr. Connelly perform any unnatural sex acts with you?
> "A. I stand under Article 31 . . .
>
> "Q. Were you ever caught by anyone while engaged in an unnatural sexual act with Mr. Connelly, Mr. Etheridge?
> "A. I am not going to say another word."

When appellant's counsel sought to interrogate the witness further, the Committee Chairman refused to allow him to proceed, stating: ". . . *we are going to have to let Mr. Etheridge go . . . He is obviously not going to answer and since he is not, it is just useless to keep going on . . .*" (J.A. 29). The Chairman made no effort whatsoever to compel or direct the witness, a Navy enlisted man, to testify.

The second alleged complainant, Robert C. Morrill, was thereupon called to testify. Morrill testified, first of all, that he had been in the Navy for less than 2 years and that he had been punished just a short time before for illegal possession of a Navy driver's license and for damaging private property (J.A. 29). For this offense, he had been reduced in rank (J.A. 29). But, when it came to the alleged charges against appellant, Morrill, like Etheridge, refused to testify (J.A. 29).

The third alleged complainant, William Coyle, was thereupon called to testify by the Committee. He stated he

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[2]Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, provides that no person in a Navy proceeding may be forced to give testimony which he believes may be self-incriminating.

was only 20 years old; that he had been in the Navy only about a year and a half; and that, prior to his enlistment, he had "been through Juvenile Court . . . two or three times . . . for malicious destruction of property" and perhaps other offenses (J.A. 29). But, Coyle, like Etheridge and Morrill, absolutely refused to testify regarding the charges against appellant. He "refused to testify" because, in his words, he had "taken Article 31" (J.A. 29).

The Chairman of the Navy Committee thereupon insisted that appellant again take the witness chair and once more he was interrogated by the Committee regarding the charges against him (J.A. 29, 30). In response to questions put by the Chairman, appellant testified as follows (J.A. 30):

> "Q. Did you commit any unnatural acts with any of these men?
> "A. No, sir . . .
>
> "Q. You say you did not commit any of these acts?
> "A. No, sir."

The Committee thereupon sought to determine from appellant why he (appellant) thought such charges would be made against him by three Navy enlisted men if the said charges were not true. Appellant testified that one of the three men, Morrill, had admitted prior to the hearing *that he made those charges solely "so he would be released from the Navy"* (J.A. 30). And, of course, during his testimony before the Committee, Coyle, one of the other two complainants, *candidly admitted that he also had been trying to find a way to get out of the Navy* (J.A. 30).[3]

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[3] In other words, it appears from the record *without dispute or contradiction* that the three complainants were endeavoring to gain their release from the Navy; and because of the nature of their charges against appellant, all qualified for release as "undesirable", and were so released (J.A. 30).

After appellant was excused as a witness for the second time, several of his fellow employees at the Naval Station were called by the Committee itself to testify. Each testified favorably regarding appellant and his reputation over 17 years at the Station, *and all advised the Committee that there were no facts known to them which could possibly lead them to believe that appellant would commit any homosexual acts* (J.A. 30).

Then, *after* the record was closed and *after* appellant's counsel had completed his closing argument and although the Navy's own Regulations (NCPI 750, 5-5 (f) (2)) specifically provides that "*charges do not constitute evidence*", the Chairman of the Navy Grievance Committee insisted upon reading into the record the written charges allegedly made against appellant by the three men who refused to testify before the Committee (J.A. 31). The Chairman again turned to the appellant and insisted that he answer the following further questions regarding the charges read into the record as aforesaid (J.A. 7, 31):

> "*Chairman*: Do you deny the contents of these statements?
>
> "*Connelly*: Yes, I do.
>
> "*Chairman*: Do you deny all, in part, or all of the statements?
>
> "*Connelly*: These are all untrue as far as I'm concerned."

In spite of the foregoing and in the face of the record referred to above, on June 6, 1961, the Commanding Officer of the Naval Air Station (who was not a member of the aforementioned Committee) nevertheless issued a final decision removing appellant from his position (J.A. 31). The Commanding Officer stated (J.A. 31):

> "At your hearing before the Field Grievance Advisory Committee on 31 May 1961 statements of your associates in these acts were read to you and you were

given ample opportunity to present evidence and to refute the charges against you. *It is considered that you failed to present such evidence or other explanation that would deny these statements.* It is, therefore, the final decision of this command that you be removed from the rolls of this station effective 9 June 1961 . . ." (Italics supplied)

On June 8, 1961, appellant appealed to the Secretary of the Navy (J.A. 31).

While that appeal was pending, one of the Navy enlisted men upon whose alleged statements the Navy's charges against appellant were based—Robert C. Morrill—suddenly relented and released a written statement to appellant and the Navy, wherein he admitted in his own handwriting, that *all of his charges against appellant were false and concocted* (J.A. 31, 32).

Approximately 6 months later, the Secretary of the Navy sustained appellant's appeal on the ground that "the procedure followed in effecting your removal from employment was fatally defective" (J.A. 32). The Secretary ordered the Naval Air Station to restore appellant to duty with back pay (J.A. 32).

Thereafter, on December 18, 1961, the Commanding Officer of the Air Station notified appellant in writing that in the event he desired to be restored to duty, he should report to the Security Officer on December 21 for reinstatement (J.A. 32).

However, when appellant accepted this offer and reported for duty, his superiors at the Station embarked upon a course of conduct whereby appellant was treated as a *pariah;* he was intentionally subjected to continuous humiliation and disgrace; and indeed, he was never reinstated to the position *at the Station from which he had been removed* (J.A. 32, 33). In this regard, the evidence before the Court is as follows (J.A. 32, 33):

(i) When appellant reported for reinstatement, his superiors promptly refused to reissue to appellant a pass or permit required by all employees for regular entry and departure at the Station gates. Appellant was denied this privilege and he was directed to report to a special Security Post each time he desired to enter the Station: and upon entry, he was to be escorted around the Station at all times by a special guard (J.A. 32).

(ii) Secondly, appellant's superiors refused to reinstate appellant to his old work as a Fire Fighter *at* the Station itself. On the contrary, these superiors advised appellant they intended to isolate him from the Station and from his old unit. Thus, appellant was arbitrarily and capriciously assigned to a distant, outlying facility, separated from the Station itself by at least 14 miles of water (J.A. 32).

(iii) Finally, while other employees were transported to and from this distant post each day in a boat supplied by the Navy—and while this trip by boat was only 14 miles —appellant was also excluded from this privilege on the ground that his presence on the boat each day would prove embarrassing to the other passengers (J.A. 32). Accordingly, appellant was required to travel alone 70 miles over land each day to and from this distant point in order to retain his employment (J.A. 32, 33). When appellant complained that this was unfair and wrong, his superiors mockingly referred to him as a "bachelor", and stated he shouldn't mind living *alone* at the distant location involved if he wanted to avoid the burdensome travel (J.A. 33).

In spite of these arbitrary, capricious actions on the part of his superiors, appellant returned to work for the Navy and he satisfactorily performed his duties, even under the onerous and almost impossible conditions mentioned above. On January 26, 1962, however, in further pursuit of this program of harrassment and oppression directed at appellant, the Commanding Officer at the Naval Station

caused to be served on appellant another Notice of Removal, *same being based substantially on the same old charges made against appellant by Coyle and Etheridge mentioned above*, (J.A. 33). *The charge theretofore made by Morrill, who subsequently notified the Navy in writing that same were false, were deleted from this Notice* (J.A. 33). Again, appellant was advised that "during the notice period you will be scheduled for work as usual" (J.A. 33).

Because the aforesaid notice was based on substantially the same old charges as those contained in the prior notice which had been rejected by the Secretary as defective and improper, *and because in the written record, which was already before the Navy, the only two complainants named in said second notice* (Coyle and Etheridge) *had steadfastly refused to testify or to be cross-examined regarding the said charges, and because through character witnesses, character certificates and testimony of fellow employees, and through his own repeated denials under oath in the said written record, appellant had established, to the full extent of his ability, his innocence of the charges against him, appellant elected simply to plead innocent to these reiterated charges and to stand on the testimony and evidence he himself had submitted during the first hearing proceeding.* Accordingly, he notified the Commanding Officer of the Naval Station on February 1, 1962 as follows (J.A. 33, 34):

> ". . . A hearing would serve no useful purpose as no new charges were presented, and I have already successfully answered the old charges.
>
> "*In reply to your notice of proposed removal, please be assured that I plead innocent to any and all charges stated and presumed in your letter . . .* Your present disposition . . . to redismiss me from service on an identical set of charges is an undisguised attempt to nullify the orders of higher echelon and a deliberate case of placing me in double jeopardy.
>
> "I request that you see fit to put an immediate arrest to the illegal and improper personnel action

which, if allowed to go through, threatens to jeopardize my interests . . ." (Italics supplied)

Thereafter, just one week later on February 8, 1962, the Commanding Officer of the Naval Station arbitrarily, capriciously and unlawfully removed appellant for the second time from his position as an employee of the United States (J.A. 34). *He did this without producing any witness or evidence to support the charges levelled against appellant by Coyle and Etheridge; without appointing any committee or board to investigate those charges or appellant's continuous denials of those charges; and without holding any hearing to determine whether there was sufficient evidence to justify any presumption of guilt beyond a reasonable doubt* (J.A. 34). Indeed, the Commanding Officer arbitrarily and summarily dismissed appellant for the second time on the basis of the following statement (J.A. 34):

> "I have considered your reply of 1 February, 1962, but have determined that your conduct was immoral, and that you did commit homosexual acts with Donald Lee Etheridge and William (n) Coyle as described in the advance notice and in their statements . . . Therefore, it is my decision that your removal from the employment rolls of this station will be effected on 16 February, 1962. This action is being taken in the best interest of the federal service."

At the time the Commanding Officer so acted to remove appellant from his position, the Navy's Regulations governing discharge proceedings provided as follows (J.A. 35, 36):

(i) NCPI 750, Section 2-3 (e)—

> "A *prima facie case* against an employee must exist before disciplinary action is initiated. A *prima facie case* is one established by sufficient evidence to justify *a presumption of guilt* BEYOND A REASONABLE DOUBT . . .
>
> "It is management's responsibility to ascertain *all* pertinent facts *prior to making a final decision and to*

uncover and attach due weight to factors supporting the employee's position WHETHER OR NOT THE EMPLOYEE OFFERS SUCH FACTORS IN HIS OWN DEFENSE". (Italics supplied)

(ii) NCPI 750, Section 5-5 (b)—

"Hearings shall be held whenever . . . the employee requests such hearing in reply to charges. *Hearings may be held, in the discretion of management, when the employee fails to request such hearing, if it is believed that hearing the case will lead to a better understanding of the case and more equitable action.*" (Italics supplied)

(iii) NCPI 750, Section 5-5 (f)—

"In hearing cases . . . the following standards and procedures *shall* be observed.

"(2) The employee shall be advised of the charges and of the contemplated penalty. *The evidence in support of the charges will then be introduced.* The evidence may be in the form of testimony of witnesses . . . and introduction of pertinent documents . . . *Charges do not constitute evidence* . . .

"(3) The employee shall be given full opportunity to reply to and refute the evidence and charges against him and to question all witnesses at the hearing . . .

"(4) The hearing officer or board shall make every effort to elicit all of the facts bearing on the case whether those facts support the charges or support the employee's position . . ." (Italics supplied)

Moreover, at the time appellant was capriciously and summarily dismissed for the second time on February 8, 1962, the Commanding Officer had before him *not only* the aforementioned Navy Regulations, but *also* two detailed written memoranda, one dated 14 September 1961 from the Chief of the Bureau of Naval Weapons and a second dated 1 December 1961 from the Secretary of the Navy, *which specifically directed him that appellant Con-*

neily could not be lawfully removed from his position under the facts here presented unless proceedings were held at which

(a) Coyle and Etheridge would be required, in appellant's presence, at least to identify and verify their signatures on the affidavits which contained their charges against appellant;

(b) Coyle and Etheridge would also be required, in appellant's presence, "to reaffirm the correctness of their statements";

(c) the Navy's investigators (who allegedly sought out and obtained the aforementioned affidavits from Coyle and Etheridge) would also be required to testify, in appellant's presence, regarding "the circumstances leading to the written accusations against the appellant"; and

(d) evidence would be taken, in appellant's presence, regarding allegations which had been made that Etheridge, one of the complainants, had previously made threats of physical violence against the appellant; and finally at which

(e) Appellant, after hearing all of the foregoing evidence against him and after thus being afforded a proper opportunity fully to understand the nature of the charges and the circumstances surrounding same, would then *and only then* be required by the Commanding Officer to present his defense against those charges.[4]

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[4] The aforementioned memoranda from the Secretary of the Navy and the Chief of the Bureau of Naval Weapons respectively are printed in the Appendix to this brief (See Appendix A). These documents were not included in the Joint Appendix herein *because they came to light in this case only after the District Court entered the Order from which this appeal was taken.* Appellees herein apparently intentionally omitted these memoranda from the Navy Administrative Record they themselves filed in the District Court. Hence, they effectively deprived the District Court of this crucial evidence, and they continued effectively to suppress these documents in their own file until counsel for appellant discovered oblique references to same in the course of his preparation of the Joint Appendix herein for printing, and demanded that Appellees produce these documents.

Accordingly, as contended later in this brief, it is appellant's position in this case that the second discharge, *like the first one*, was not only patently arbitrary and capricious, but *it was also completely unlawful and directly contrary to and in violation of the Navy's own Regulations and of the aforesaid specific instructions and directives given by the Secretary of the Navy and the Chief of the Bureau of Naval Weapons to appellant's superiors with special reference to this case and to the charges which had been levelled against Mr. Connelly.* These Regulations and instructions required the commanding officer in a case of this kind to hold a hearing or some similar proceeding, *on his own motion if necessary*, in order to hear and develop *all of the facts, all of the evidence and to determine (in the words of the Regulations) whether there was "sufficient evidence to justify a presumption of guilt beyond a reasonable doubt"*. Indeed, as the Regulations themselves direct—[5]

> "It is management's responsibility to ascertain all pertinent facts prior to making a final decision and to uncover and attach due weight to factors supporting the employee's position *whether or not the employee offers such factors in his own defense.*" (Italics supplied)

Upon receipt of this grossly improper notice of removal, appellant promptly appealed to both the Civil Service Commission and the Secretary of the Navy (J.A. 36).

On March 30, 1962, however, the Civil Service Commission's Third Region denied appellant's appeal, stating that *the Commission had no authority to review "the merits of the Navy's action"* (J.A. 36). On August 13, 1962, this decision was affirmed by the Commission's Board of Appeals and Review *which likewise decided that the Commission had no authority to review the merits of the Navy's case against appellant* (J.A. 36, 37). Finally, on May 24,

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[5] NCPI 750, Sections 2-3(c).

1963, the Civil Service Commission itself affirmed these rulings, *again without passing on the merits of the case or whether the Navy's actions were arbitrary, capricious, unlawful or without support in the evidence* (J.A. 37).

In the meantime, the Secretary of the Navy mysteriously refused to interfere with appellant's second dismissal, albeit same had been accomplished in violation of the Navy's own Regulations and in complete contravention of the Secretary's own written instructions in this case (J.A. 37). The Secretary stated simply (J.A. 37):

> "It is found that the action taken by the Commanding Officer of the U.S. Naval Station Patuxent River, was warranted under the circumstances."

Appellant, thus separated from his job and without funds to prosecute his claims for reinstatement and back pay, turned to his federal employee union for assistance (J.A. 37). On June 16, 1964, after careful investigation by its committees and legal counsel of the facts and circumstances here involved, the union voted to assist appellant in the presentation of his said claims. The instant action was therefore commenced on August 31, 1964, approximately 16 months after the final action of the Civil Service Commission in this case.

SUMMARY OF ARGUMENT

The District Court clearly had the power to review appellant's discharge and to determine whether same was illegal or in violation of the Navy's own regulations and specified procedures; or whether same was arbitrary, capricious, or without support in the evidence (*Pelicone* v. *Hodges*, D.C. App. 1963, 320 F. 2d 754; *Weinberg* v. *Macy*, D.C. App. 1966, 65 F. 2d 897; *Powell* v. *Zuckert*, D.C. App. 1966, 366 F. 2d 634; *Hepner* v. *District of Columbia*, D.C. App. 1967 (No. 19,122, decided 6/9/67)). Under the facts and circumstances here involved, it is perfectly clear that

appellant's discharge for the second time was arbitrarily and capriciously accomplished by superior officers in direct violation of the applicable Navy Regulations and contrary to specific written instructions given in this case by the Secretary of the Navy and the Chief of the Bureau of Naval Weapons. Such discharge is plainly unlawful and void (*Service* v. *Dulles*, 354 U.S. 363 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Olenick* v. *Brucker*, D.C. App. 1959, 273 F. 2d 819; *Ingalls* v. *Zuckert*, D.C. App. 1962, 309 F. 2d 659; *Powell* v. *Zuckert*, *supra*).

Appellant contends also that his discharge from the very outset was invalid as a matter of law. The removal charges against appellant were not sufficient to provide appellant a fair opportunity to defend against same, and the Navy failed, contrary to its own Regulations and written instructions of the Secretary and Chief of the Bureau of Naval Weapons, to support the charges with any detailed allegations or evidence; it failed to name or produce the investigators who allegedly obtained the written charges against appellant or to specify the circumstances under which that investigation was initiated or conducted; and it failed in any manner to specify or prove that appellant, after 17 years of faithful, satisfactory service to the United States Navy, was guilty of any "*notoriously* disgraceful conduct" (*Money* v. *Anderson*, D.C. App. 1953, 208 F. 2d 34; *Manning* v. *Stevens*, D.C. App. 1953, 208 F. 2d 827; *Deak* v. *Pace*, D.C. App. 1950, 185 F. 2d 997).

This brief also contends that appellant's discharge, predicated exclusively on a finding of "*immoral conduct*", which, in turn, was based solely on such vague, obscure labels as "*homosexual acts*" or "*homosexual conduct*"—all without any testimony or evidence in the record to explain or support same—was likewise patently invalid (*Scott* v. *Macy*, D.C. App. 1965, 349 F. 2d 182; *Clackum* v. *United States*, 148 C. Cl. 404 (1960); *Clark* v. *United States*, 162 C. Cl. 477 (1963)).

Finally, appellant asserts herein that his discharge was invalid because the Navy failed to allege or prove any legitimate relationship between the charges against appellant and his occupational duties, qualifications and efficiency as a Fire Fighter—a job he satisfactorily performed for 17 years prior to the charges, and which he continued satisfactorily to perform during periods the charges were pending against him and he was still permitted to work (*Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Vitarelli* v. *Seaton*, *supra*; *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 238, 39 (1957); *United Public Workers* v. *Mitchell*, 330 U.S. 74, 101 (1947); *Scott* v. *Macy*, *supra*). Indeed, Congress itself has provided that no federal employee can be dismissed from his position solely because of some physical disability or abnormality which does not otherwise interfere with the performance of his work for the Government (5 U.S.C. 632(9)).

POINT I

The District Court Clearly Had the Power To Review Appellant's Discharge and To Rule, Under the Facts Here Presented, That Same Was Illegal, in Violation of the Navy's Own Regulations and Procedures; and That Same Was Arbitrary, Capricious and Not Supported by Any Valid Evidence

During recent years, the Supreme Court and this Court having meticulously sought in a long line of decisions to make it crystal clear that the district courts are indeed empowered to and should exercise their authority to set aside unlawful, unjust, arbitrary and capricious dismissals of federal employees and those not supported by a preponderance of the evidence, or which violate the regulations or procedures promulgated to govern such disciplinary actions (*Service* v. *Dulles*, 354 U.S. 363 (1957); *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959); *Pelicone* v. *Hodges*, D.C. App. 1963, 320 F. 2d 754; *Weinberg* v. *Macy*, D.C. App. 1966, 365 F. 2d 897; *Powell* v. *Zuckert*, D.C. App. 1966, 366 F. 2d 634; *Hepner* v. *District of Columbia*, D.C. App. 1967, No. 19,122, decided 6/9/67).

A. Appellant's Discharge, Accomplished in Violation of the Navy's Own Regulations and Procedures, Is Invalid Per Se

In *Service* v. *Dulles*, *supra*, and *Vitarelli* v. *Seaton*, *supra*, the Supreme Court ruled that whenever a federal agency, in the course of the dismissal of one of its employees, violates the letter or spirit of its own regulations or procedures governing such discharges, that dismissal is invalid *per se*. And, as indicated above, that same rule has repeatedly been applied by this Court to set aside federal employee discharges accomplished in violation of departmental regulations or procedures (*Olenick* v. *Brucker*, D.C. App. 1959, 273 F. 2d 819; *Ingalls* v. *Zuckert*, D.C. App. 1962, 309 F. 2d 659; *Powell* v. *Zuckert*, *supra*).

In the case at bar, it is difficult to fathom why the district court, presented with the uncontradicted facts and circumstances here involved, failed to apply that rule to set aside appellant's patently invalid discharge; or why the district court, *without voicing any reason or opinion*, summarily dismissed appellant's complaint herein and granted appellees' motion for summary judgment. The only feasible explanation is that, by reason of appellees' suppression of the written memoranda now contained in Appendix A to this brief, the district court somehow failed to grasp the seriousness and the capriciousness of the Navy's purposeful failure to follow its own regulations and procedures, as part of its predetermined decision to get rid of appellant, after 17 years of satisfactory service to the United States, irrespective of the complete lack of any sustainable case against him.

But, irrespective of why the district court acted as it did in this case, the facts in the record before this Court show plainly, we submit, that the Navy's entire second discharge proceeding against appellant herein violated that department's own regulations and procedures *from the very beginning to the end*. First of all, the Navy's own regulations (N.C.P.I. 750, 6-4(b)) provide: "When a sus-

pension or removal action is found to be procedurally defective, a new and procedurally correct action may be initiated against the employee. *Such action should normally be initiated within 15 days after the date the suspension or removal is cancelled*" (J.A. 15). The record before the Court shows that appellant's first removal by the Navy was overruled by the Secretary of the Navy *and same was cancelled on December 1, 1961* (J.A. 44): and appellees admit and concede that appellant was restored to duty *on December 22, 1961* (J.A. 44, 45). Appellees likewise *concede* on the face of the record *that the Navy's second attempt to remove appellant was not commenced until January 25, 1962—i.e. 55 days after the Secretary's action of December 1 and 34 days after appellant was restored to duty.* Ergo, from the very outset, the second attempt to remove appellant from his position was in violation of the department's own regulations. At no point have the appellees offered any explanation, reason or excuse for this improper delay.

The Navy's regulations (N.C.P.I. 750, 5-3; N.C.P.I. 750, 2-3(c)(1), (3) and (4)) also expressly provide (J.A. 16):

> "(1) The primary function of disciplinary procedure prior to decision is to determine the facts, not to provide a means for prosecuting the employee . . .
>
> "(3) The employee must be confronted with all the evidence that influences Management's consideration of the case and must be permitted to defend himself against such evidence . . .
>
> "(4) It is Management's responsibility to ascertain all pertinent facts prior to making a final decision *and to uncover and attach due weight to factors supporting the employee's position whether or not the employee offers such factors in his own defense*". (Italics supplied)

And, of course, the Navy's regulations (N.C.P.I. 750, 2-3(c)) also provide:

> "A *prima facie* case against an employee must exist before disciplinary action is initiated. A *prima facie*

> case is one established by sufficient evidence to justify a presumption of guilt beyond reasonable doubt . . ."

In the case at bar, at the time the second discharge proceeding was initiated, the Navy knew that the two remaining complainants against appellant had steadfastly refused to testify or to be cross-examined regarding the charges they had levelled against appellant; the Navy knew that one of the three original complainants had retracted his charges and declared same were false and concocted; the Navy knew that appellant had been absolutely constant and consistent in his denial of the charges; and the Navy knew that a long line of witnesses had appeared and voluntarily attested to the fact that appellant was, in no respect, "homosexual". *But seemingly the Navy elected to forget, ignore and overlook all of these facts in favor of an all-out, arbitrary effort to make appellant's discharge stick.* In other words, *contrary to its own regulations*, it rejected the idea that "The primary function of disciplinary procedure prior to decision is to determine the facts, *not* to provide a means for prosecuting the employee . . ." On the contrary, its sole purpose was "to prosecute" appellant, and in order to do this, it simply chose to ignore all evidence and facts favorable to appellant and to rely *exclusively* on the tarnished charges of Coyle and Etheridge who, after making the said charges, quickly retreated behind Article 31 of the Military Code—*and who, by the time the charges were reiterated against appellant for the second time, had already successfully gained their release from the Navy and had returned to civilian status* (J.A. 45, ft. 10).

The Navy's violation of its own regulations did not end there however. Whereas those regulations require that "The employee must be confronted with *all the evidence that influences Management's consideration of the case* and must be permitted to defend himself against such evidence"; and whereas, the memoranda from the Secretary

and Chief of the Bureau of Naval Weapons (Appendix A hereto) specifically directed in this case that "*the special investigators of the Security Division*" *who conducted the investigation of the charges against appellant be identified and* "*the circumstances leading to the written accusations against appellant (be) presented*"—the notice of removal served on appellant on January 25, 1962 made *no reference whatsoever to these investigators or to the facts and circumstances which led to the investigation and to the accusations which Coyle and Etheridge lodged against the appellant.* In this regard, the Navy not only violated its own regulations; it effectively deprived Appellant contrary to the instructions of its own top management officials, of due process of law and of a fair opportunity to defend himself against evidence which the Navy suppressed and has never released to this very day.[6]

All of this, of course, is likewise a far cry from the Navy regulations which state: "It is Management's responsibility . . . to uncover and attach due weight to factors supporting the employee's position whether or not the employee offers such factors in his own defense"; and "Hearings may be held, in the discretion of management when the employee fails to request such hearing, if it is believed that hearing the case will lead to a better understanding of the case and more equitable action".[7] It is difficult to imagine any case in which the circumstances would more clearly require management to exercise its discretion and schedule a hearing on its own motion than this case! *Indeed, management's decision in this respect was effectively dictated by the memoranda received from the Secretary and the Chief of the Bureau (Appendix A hereto).* Those

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[6] In this regard, the Navy has never released the names of the investigators; it has never disclosed how or why the investigation was initiated; and it has never disclosed the circumstances under which written statements were taken from Coyle and Etheridge, by whom, or where.

[7] N.C.P.I. 750, 5.5(b).

memoranda contained the following criticisms of the first *defective* discharge procedure; and thus the Commanding Officer was on notice that if he thereafter intended *lawfully to discharge* appellant, *he would have to hold a hearing* at which

(1) Management would introduce evidence in support of its case;

(2) Coyle and Etheridge would be called to verify their signatures on their statements and affidavits and "to reaffirm the correctness of their statements";

(3) Background information surrounding the circumstances leading to the written accusations against appellant would be presented;

(4) The Navy investigators would be summoned to testify;

(5) Etheridge's threats against appellant would be explored; and

(6) Appellant would be afforded an opportunity to meet all additional evidence so presented.

Having *failed to hold such a hearing and having intentionally failed to present the evidence required by the memoranda* in Appendix A hereto, we submit the Navy again violated both the letter and spirit of its own regulations and procedures in still another important, material respect.

In fact, having violated the letter and spirit of its own regulations and procedures and having thus failed to produce any witnesses or evidence against appellant under the circumstances here involved, the Navy left appellant in somewhat the same position as Dr. Peters in *Peters* v. *Hobby*, 349 U.S. 331. In that case, the Supreme Court overruled the dismissal of a federal employee who, like appellant here, had been improperly and unfairly removed

from his position. In his concurring opinion in that case, Mr. Justice Douglas (joined by Mr. Justice Black) stated, at pages 351, 352:

> "Dr. Peters was condemned by faceless informers . . . None of them had to submit to cross-examination. None had to face Dr. Peters. So far as we or the Board know, they may be psychopaths or venal people . . . They may bear old grudges. Under cross-examination their stories might disappear like bubbles. Their whispered confidences might turn out to be yarns conceived by twisted minds or by people who, though sincere, have poor faculties of observation and memory.
>
> ". . . *The practice of using faceless informers . . . to get rid of employees in the Government . . . is an un-American practice we should condemn. It deprives men of 'liberty' within the meaning of the Fifth Amendment, for one of man's most precious liberties is the right to work. When a man is deprived of that liberty without a fair trial, he is denied due process.* If he were condemned by Congress and made ineligible for government employment, he would suffer a bill of attainder, outlawed by the Constitution . . . An administrative agency—the creature of Congress—certainly cannot exercise powers that Congress itself is barred from asserting." (Italics supplied)

The Court's attention in this respect is also directed to the Supreme Court's decision in *Greene* v. *McElroy*, 360 U.S. 474. In that case, the Supreme Court, with only one dissent, ruled that the Defense Department was without authority to take away the security clearance of a person working for a Government contractor in an administrative proceeding in which he was not provided with all of the evidence and identity of all of the witnesses against him. In that case, Chief Justice Warren, writing for the Court, stated, at page 496:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, *and the reasonableness of the action depends on*

> *fact findings, the evidence used to prove the Government's case must be disclosed to the individual* so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy . . . This Court has been zealous to protect those rights from erosion. It has spoken not only in criminal cases . . . but also in all types of cases where administrative and regulatory actions were under scrutiny . . ." (Italics supplied)

Please see also *Clackum* v. *United States*, 148 C. Cls. 404 (1960), a case involving facts and circumstances very similar to the case at bar, in which the Court of Claims overruled the dismissal of a member of the armed forces because of the Government's failure to disclose all of the facts and the identity of all persons who participated in the development of the "immorality" charges levelled against Clackum in that instance.

In this action, the Navy's sole excuse for having violated its own regulations; for having ignored the written instructions of the Secretary of the Navy and the Chief of the Bureau of Naval Weapons; for having failed to initiate the discharge proceeding on time; for having failed to disclose to appellant in the charges the facts and circumstances which led to the investigation against him and to the affidavits of Coyle and Etheridge; for having failed to investigate facts favorable to appellant; for having failed to take into consideration any of the facts which were favorable to appellant; and for having failed to hold a hearing (as directed by the Secretary and the Chief of the Bureau) at which Coyle and Etheridge (in appellant's presence) would be required to verify their affidavits, and at which the Navy investigators in the case would be required to testify and at which Etheridge's prior threats against appellant would be fully explored—*is that appel-*

lant waived a hearing when he responded to the charges on February 1, 1962 (J.A. 46, 47). The short answer to this lame, frivolous "excuse" is that, under the applicable regulations, the Navy, *not appellant*, was in complete charge of the administrative discharge proceeding; and under those regulations, irrespective of appellant's actions, *it was the Navy's responsibility and duty*

(i) "to determine the facts" and *not* to prosecute the employee;

(ii) to confront the employee with all the evidence that influences Management's consideration of the case: *and in this regard, the Navy was under specific instructions from top authority to furnish appellant with all of the facts which led to the investigation, as well as "to confront" appellant with Coyle and Etheridge, who would be required to verify their affidavits in his presence; and "to confront" appellant with the Navy investigators who obtained the said affidavits;*

(iii) "to ascertain *all* pertinent facts prior to making a final decision and to uncover and attach due weight to factors supporting the employee's position *whether or not the employee offers such factors in his own defense"; and*

(iv) to hold a hearing "*when the employee fails to request such hearing*, if it is believed that hearing the case will lead to a better understanding of the case and more equitable action"; *and of course, in this instance, the Commanding Officer at the Station was under specific written instructions from top authority to hold such a hearing and to confront appellant with the accusers against him.*

But, of perhaps equal importance, is the fact that the "*waiver*" upon which the Navy so strenuously relies is indeed not a sufficient, clear-cut waiver at all. In that

letter, appellant stated, first of all: "*In reply to your notice of proposed removal, please be assured that I plead innocent to any and all charges stated and presumed in your letter*" (Appellant's Exhibit 6; xeroxed record). Appellant then went on to state simply: "A hearing would serve no useful purpose *as no new charges were presented, and I have already successfully answered the old charges*" (Appellant's Exhibit 6).[8] Finally, appellant's letter concluded: I request that you see fit to put an immediate arrest to the illegal and improper personnel action, which, if allowed to go through, threatens to jeopardize my interests."

This letter, we submit, did no more than place the burden of going forward with the development and presentation of the evidence squarely on the shoulders of the Navy, where it clearly belonged under the regulations and as a matter of law. Appellant's letter reiterated his plea of *innocence*. Under the Navy regulations, "Charges *do not* constitute *evidence*". (N.C.P.I. 750, 5-5 (f) (2)); and "A *prima facie case* (one established by *sufficient evidence* to justify a presumption of guilt beyond reasonable doubt) must exist "before an employee can be removed from the Navy (N.C.P.I. 750, 2-3 (c)). *A fortiori*, when the Navy elected to discharge appellant without producing any *evidence* at all, that discharge was a complete nullity.[9]

---

[8] The Court will understand, of course, that on February 1, 1962, the Navy already had in its possession *the complete written transcript of the original hearing on the charges*, whereat Coyle and Etheridge refused to testify; appellant repeatedly denied the charges; and appellant's evidence against the charges was perpetuated.

[9] This is not the first time the Government, in a case of this nature, has sought to defeat a federal employee's rights by alleging that somehow he "waived" those rights during the course of an administrative proceeding. Indeed, the same "waiver" argument was advanced by the Government before this Court in *Scott* v. *Macy*, 349 F. 2d 182, but fortunately and correctly, that argument was rejected by this Court on the ground that Scott, like appellant in the case at bar, repeatedly expressed his innocence of the charges and reiterated his right to exoneration. (See *Scott* v. *Macy*, 349 F. 2d 182, 186.)

B. Appellant's Discharge Was Patently Pre-Determined, Arbitrary and Capricious

We shall not belabor this point because we believe it is self-evident in the factual statement of this case set forth hereinabove. However, the Court's attention is specifically directed to Appellant's Exhibit 5 in the xeroxed record before the Court entitled "Discussion Incident to Return of George A. Connelly held in the Office of the Industrial Relations Officer 21 December 1961. That transcript, prepared by the Navy, was made at the time appellant was restored to duty *after* the first discharge was declared defective by the Secretary. It shows on its face that even before appellant was reinstated, he was capriciously advised by the Industrial Relations Officer—

> "*Mr. Ocker:* Because this has been judged as procedural (sic) defective, we are privileged, and fully intend to go ahead with the proposed removal. This cannot be considered double jeopardy and we are allowed to use whatever evidence we used before, plus whatever new evidence we have obtained. If we do proceed correctly *there is no reason in the world why you will not again be removed . . .* " (Italics supplied)

This, we submit, indicates beyond peradventure that long before the second discharge proceeding was initiated on January 25, 1962, the Navy had *predetermined* arbitrarily and capriciously to remove appellant from his position, irrespective of any action he might take to defend himself.

That same transcript, prepared by the Navy, also shows how the Navy arbitrarily and capriciously refused to reinstate appellant to his position at the Station: how the Navy assigned him to distant Solomons, separated from the Station by 14 miles of water; how the Navy denied him his old pass required by employees to enter the Station; how the Navy refused to permit him to travel to and from the aforementioned distant post on the boat made available by the Navy for all other employees. More specifi-

cally, the said transcript contains the following colloquy between appellant and the Industrial Relations Officer:

> "*Mr. Connelly:* Do I get a new pass—or my old one back?
>
> *Mr. Ocker:* It is not necessary to have a pass since you will have no occasion to come to the base unless we call you.
>
> *Mr. Connelly:* Can't I take the boat?
>
> *Mr. Ocker:* We're sending you to Solomons to spare you the embarrassment of meeting and contacting people on the base who know you and who have abused you in the past and protect you from possible violence. We would be defeating that purpose if you come aboard and ride the boat.
>
> *Mr. Connelly:* How do I get there?
>
> *Mr. Ocker:* Since you're a bachelor perhaps you'd like to move there, or you can drive over the bridge, it's not too far from Leonardtown and, we have a lot of people who go and come that way."

Finally, the Court's attention is directed to Appendix C hereto, more specifically to the excerpts from the Standard Schedule of Disciplinary Offenses and Penalties For Civilian Employees In the Naval Establishment. *That schedule shows that there are two possible penalties for a first offense involving "immoral, indecent, or notoriously disgraceful conduct"—to wit, "reprimand" or "removal."* In the case at bar, the Navy arbitrarily and capriciously ignored its own regulations in this respect, and without stating any reason whatsoever why a "reprimand" would not be sufficient punishment in a case involving an employee with 17 years of prior satisfactory service—the Navy bluntly and summarily removed appellant from his position.

C. Appellant's Discharge Is Not Supported by a Preponderance of Evidence

In *Pelicone* v. *Hodges*, *supra*, this Court ruled that the district court is empowered to set aside the discharge of any federal employee on charges which are not supported by a preponderance of the evidence. Again, we will not belabor this point in detail because we believe it is likewise self-evident from the earlier portions of this brief that appellant's discharge in the case at bar not only violated the Navy's own regulations and procedures, but it is unsupported by any valid evidence of any kind. *Certainly, it is not supported by a preponderance of the evidence.* It is founded *entirely* on the affidavits of Coyle and Etheridge, two discredited men who refused to testify and who have never been recalled by the Navy to testify in support of their charges or accusations. Moreover, under the Navy's own regulations, "charges do not constitute evidence"—and clearly, the Navy has treated these two affidavits as nothing but "*charges*"—*not* evidence. In the words of the chief of the Bureau (Appendix A hereto):

> "The . . . enlisted men who gave the statements should have been asked . . . to verify their signatures on the affidavits and to reaffirm the correctness of their statements. This would have enhanced the presentation of the charges immeasurably."

POINT II

Appellant's Discharge Was Likewise Invalid Because the Charges Levelled Against Him Lacked the Specificity Required by the Applicable Removal Procedure

In *Money* v. *Anderson*, 208 F. 2d 34, *Manning* v. *Stevens*, 208 F. 2d 827, and *Deak* v. *Pace*, 185 F. 2d 997, this Court set aside removals of federal employees based on charges of alleged immorality or some similar charge on the ground that same "lacked the specificity required by the applicable removal procedure." In this case, Appendix A hereto shows that top management of the Navy itself was ex-

tremely dissatisfied with the manner in which the original charges against appellant were stated; and we submit that the second set of charges almost completely ignored management's written dissatisfaction therewith and same are thus still seriously and materially lacking in the specificity required for sustainable charges. As in *Money v. Anderson*, 208 F. 2d 34, 38, the very serious charges levelled against appellant (including the complainant's alleged handwritten charges) do not specify sufficiently the places, dates and circumstances surrounding the alleged acts involved. In this regard, at the time these charges were brought against appellant for the second time, the Commanding Officer had before him the following admonitions from top management (Appendix A hereto):

> ". . . an advance notice shall state any and all reasons for the proposed adverse action specifically and in detail, including dates, specific instances and other data sufficient to enable the employee to fully understand the charges and to adequately join issue with the proposed action. The criteria usually applied to the specificity requirement is that the innocent who has no knowledge of the circumstances surrounding the charges will have sufficient information upon which to understand and take issue with the charges. After reviewing *all* of the material available, it is believed that the activity could have been more specific in citing the charges by giving approximate dates and locations of the specific actions. This would have materially enchanced the station's position with respect to this requirement."

However, comparing the original advance discharge notice dated May 19, 1961 (Appellant's Exhibit 1) with the second notice dated January 25, 1962 (Appellant's Exhibit 4), we submit there was no material improvement regarding the required specificity in the second notice. *Both* basically refer to the alleged "commission of homosexual acts"—"during the period of 1 January 1961 to 1 May 1961." The second notice seeks to be a bit more

specific regarding dates of the alleged Coyle offenses, *but there is no change or improvement whatsoever regarding the Etheridge charges in the second notice.*

Moreover, while the Chief of the Bureau specifically advised the Commanding Officer on September 14, 1961 (Appendix A hereto) that—"No background information surrounding the circumstances leading to the written accusations against the appellant was presented"—*the second notice, like the first, is completely silent and lacking in the assertion of any specific facts or allegations as to how the charges against appellant arose, when, where and under what circumstances.*

Then, contrary to management's express instructions, the second notice failed completely to identify the Navy personnel who allegedly conducted the investigation against appellant and who, in the absence of Coyle and Etheridge (who were by then in civilian status) were available to support the authenticity of any factual evidence which might be presented against the appellant.

Finally, while the charge against appellant was "*immoral*, indecent, *notoriously disgraceful* conduct as delineated in Article 26 of Standard Schedule of Disciplinary Offenses and Penalties for Civilian Employees in the Naval Establishment" (Appendix C hereto), *there was absolutely no specific fact alleged to support the charge that appellant's conduct was "immoral and notoriously disgraceful"*. In this connection, the Court's attention is directed to Appendix B hereto, a letter, released on August 22, 1967 by the Civil Service Commission, which states, at page 3:

> "Cases involving questionable morality raise special problems because the morals of an individual are generally considered to be his own private affair. Also, there is a wide variation of views in our society, both between individuals and social groups, as to what constitutes immoral conduct. The problem is com-

plicated further by laws pertaining to moral conduct which vary considerably from state to state. In addition, individual cases of immorality frequently are not matters of general knowledge; this makes the danger of spreading derogatory information imminent . . .

"The . . . letter raises an inference that the bearing of an illegitimate child has special significance as to suitability or security. *Under Commission policy this fact itself is not considered a disqualification. Under Commission standards, immoral conduct is significant only when accompanied by notoriety, scandal or public censure . . .*" (Italics supplied)

POINT III

Appellant's Discharge, Predicated Exclusively on a Finding of "Immoral Conduct", Which, in Turn, Was Based Solely on Such Vague, Obscure Labels as "Homosexual Acts" or "Homosexual Conduct", Was Patently Invalid.

When the Navy finally discharged appellant for the second time on February 8, 1962, the sole basis for the said action was stated by his Commanding Officer as follows (J.A. 34):

"I . . . have determined that your conduct was *immoral*, and that you did commit *homosexual acts* with Donald Lee Etheridge and William (n) Coyle . . ."

In its recent decision in *Scott* v. *Macy*, D.C. App. 1965, 349 F. 2d 182, this Court stated in the course of its opinion, at Page 185:

"The Commission may not rely on a determination of 'immoral conduct', based on such vague labels as 'homosexual' and 'homosexual conduct' as a ground for disqualifying appellant for Government employment."

And, at page 184, Chief Judge Bazelon stated:

"The Commission excluded appellant from public employment because it concluded that he had engaged in 'immoral conduct'. With this stigma, the Commission not only disqualified him from the vast field of

> all employment dominated by the Government, but also jeopardized his ability to find employment elsewhere. The stigmatizing conclusion was supported only by statements that appellant was a '*homosexual*' and had engaged in '*homosexual conduct*'. These terms have different meanings for different people. They therefore require more specification. The Commission must at least specify the conduct it finds 'immoral' and state why that conduct related to '*occupational competence or fitness*', especially since the Commission's action involved the gravest consequences. Appellant's right to be free from governmental defamation requires that the Government justify the necessity for imposing the stigma of disqualification for 'immor al conduct' ". (Italics supplied)

This Court was careful in the *Scott* case to point out, at pages 183, 184, that plaintiff Scott, being *only* an *applicant for federal employment*—not a long standing federal employee such as appellant herein—had "*less* statutory protection against exclusion than an employee" of the Government. Nevertheless, this Court concluded, at page 184:

> "But he (Scott) is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government. The Executive may have discretion in hiring or firing, but 'discretionary power does not carry with it the right to its arbitrary exercise'. Schactman v. Dulles, 225 F. 2d 938, 941."

Applying the rule of the *Scott* case to the case at bar, we respectfully submit that the Navy's final discharge notice of February 8, 1962 (J.A. 34), based solely on a finding that appellant's "*conduct was immoral*" and that appellant "*did commit homosexual acts*", was insufficient and void. For this additional reason, appellant's discharge must be set aside as a matter of law and appellant is entitled to be restored to his position as a Fire Fighter.

POINT IV

Appellant's Discharge Was Invalid Because the Navy Failed To Show Any Legitimate Relationship Between the Alleged Charges Against Appellant and His Occupational Duties, Qualifications and Efficiency as a Fire Fighter

Completely aside from the legal and procedural defects discussed in Points I through III of this brief, appellant submits that his discharge was invalid on the further ground that the Navy failed to charge, allege or prove any legitimate relationship between the charges against appellant and his occupational duties, qualifications and efficiency as a Fire Fighter. In this connection it is important to remember that appellant was employed by the Navy as a Fire Fighter for 17 years before he was discharged, and the record shows that his efficiency and performance ratings were always satisfactory. Indeed, he continued on duty and he rendered satisfactory service even after the instant charges were filed against him.

The record also shows that when the said charges were levelled against appellant, several of his fellow fire fighters appeared and testified in support of appellant. Significant also is the fact that none of appellant's superiors appeared and testified against him.

Thus, the record here presents the ugly picture of a federal employee, with 17 years of exemplary service, suddenly dismissed from his position on charges of alleged "immorality" *without any allegation or proof whatsoever that there is any legitimate relationship between the said charges and appellant's qualifications or efficiency as a fireman.* The utter lack of any such showing was thus absolutely fatal to the validity of appellant's discharge (*Shelton* v. *Tucker*, 364 U. S. 479 (1960); *Vitarelli* v. *Seaton*, *supra*; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 238, 39 (1957)). In *Shelton* v. *Tucker*, a state requirement that teachers annually list each organization

to which they belonged or regularly contributed during the preceding 5 years was set aside by the Supreme Court on the ground that

> "such relationships would have no possible bearing upon the teacher's occupational competence or fitness." (See 364 U. S. 488).

In the Supreme Court's earlier decision in *United Public Workers* v. *Mitchell*, 330 U. S. 74, 101 (1947), the Court stated:

> "For regulation of employees, it is . . . necessary that the act regulated be . . . reasonably deemed . . . to interfere with the efficiency of the public service."

Finally, in *Scott* v. *Macy, supra*, Chief Judge Bazelon stated, in the course of his opinion, that in order to make charges of homosexual activity on the part of a federal employee or applicant for federal employment a sustainable ground for exclusion from federal service, the agency involved must allege and prove—

> ". . . why that conduct related to occupational competence or fitness . . ."

Please see also: *Pelicone* v. *Hodges, supra*, at 320 F. 2d 754, where this Court reversed a federal employee's dismissal based on charges of alleged "immorality" on similar grounds.

In the instant action, it is difficult indeed to fanthom how the alleged charges against appellant, even if same were assumed to be true, would automatically and forever disqualify him *as a Fire Fighter*, or as a laborer, or as a janitor, or as a machinist, or from some similar nonsensitive job. If society, with the Federal Government in the lead, is to make it absolutely impossible for all poor souls afflicted with some sort of sex or physical abnormaley to earn their daily bread in any type of employment role, then the day ahead for these afflicted persons is going to

be dark indeed. Any such rule, we submit, would be directly contrary to 5 U.S.C. 632 (9), which provides as follows:

> ". . . that no person shall be discriminated against in any case because of any physical handicap, in examination, appointment, reappointment, reinstatement, reemployment, promotion, transfer, retransfer, demotion, or removal, with respect to any position the duties of which, in the opinion of the Civil Service Commission, may be efficiently performed by a person with such a physical handicap: *And provided further*, That such employment will not be hazardous to the appointee or endanger the health or safety of his fellow employees or others. . ."

And, such rule would likewise be directly contrary to recently announced Civil Service Commission policy in this area, as set forth in Appendix B hereto.

CONCLUSION

The Order of the District Court, totally unsupported by reason or opinion, should be reversed and appellant should be reinstated to his position.

Respectfully submitted,

EDWARD L. MERRIGAN
Attorney for Appellant
1700 Pennsylvania Avenue, N.W.
Washington, D. C.

APPENDIX A

Memorandum from Chief, Bureau of Naval Weapons, to Commanding Officer, U.S. Naval Air Station, Patuxent River, Maryland, Dated 14 Sept. 1961, Entitled "Subj. Removal of George A. Connelly"

14 Sept. 1961

From: Chief, Bureau of Naval Weapons

To: Commanding Officer
U.S. Naval Air Station
Patuxent River, Maryland

Subj: Removal of George A. Connelly

Ref: (a) NCPI 750.5-5b(2)
(b) NCPI 750.5-5d
(c) NCPI 750.5-5f(2)
(d) NCPI 750.5-3e(3)
(e) NCPI 750.3-1b(3)
(f) NCPI 750.10 Encl. (2) NOTE (3)
(g) NCPI 290.7 Encl. (5) Part III
(h) NCPI 290.2-4b
(i) NCPI 750.5-3c(3)

1. The removal appeal of Mr. Connelly has been reviewed and forwarded to the Chief of Industrial Relations recommending that the appeal be denied. In reviewing the case certain procedural deficiencies were noted as follows:

a. Disciplinary Advisory Hearing of 31 May 1961

(1) The Advisory Hearing Board conducting the hearing was erroneously designated and functioned as a Field Grievance Advisory Committee rather than as an Advisory Hearing Board constituted for disciplinary hearings under the provisions of reference (a).

(2) Management failed to provide representation to introduce evidence in support of its case as provided in

reference (b). Consequently, it was necessary for the Chairman inappropriately to assume the role of management representative to prosecute the case. This naturally had an inhibiting effect on the conduct of the hearing and created an erroneous impression.

(3) Mr. Connelly and his representatives were not given the opportunity to examine the written statements of the three enlisted men which formed the basis of the charges, as provided by reference (c). The fact that the Chairman did not introduce these statements until the hearing was well underway and then only partially, further hampered the appellant from understanding or joining issue with the charges. The three enlisted men who gave the statements should have been asked, at the outset of their testimony to verify their signatures on the affidavits and to reaffirm the correctness of their statements. This would have enhanced the presentation of the charges immeasurably.

(4) No background information surrounding the circumstances leading to the written accusations against the appellant was presented. The reasonableness and justification of management's case could have been strengthened appreciably if the special investigators of the Security Division who took and attested to the written depositions had been called upon to testify. Additionally, Donald L. Etheridge's alleged threat to Mr. Connelly in the fire house was not explored fully, even though it was a strongly related adjunct to the case in support of the validity of the charges. The Chief Petty Officer could have possibly shed light on the case had he been called to testify.

(5) There is no evidence that the record of the hearing was given to the appellant for a review and comment prior to rendering a final decision.

b. Final Notice of Decision of 6 June 1961

(1) Mr. Connelly was informed that he could appeal his removal to the Under Secretary of the Navy within 10 days

after the effective date of removal. Reference (d) provides for an appeal to the Secretary of the Navy within 15 working days after the effective date of removal.

c. Notice of Personnel Action Standard Form 50 Effecting Removal

(1) The Industrial Relations Officer signed the Standard Form 50. This was improper since reference (e) provides that the official having the authority to effect the action shall sign removal actions. Reference (f) provides that an Industrial Relations Officer shall not sign the Standard Form 50 effecting disciplinary action except for his own subordinates.

(2) Item 19 of the Standard Form 50 is inadequate. Reference (g) requires that the causes of a removal or separation be described in sufficient detail to enable the Civil Service Commission to determine the employee's reemployment eligibility and retirement rights and to provide state agencies with sufficient information so that the employee's right to unemployment compensation may be determined.

(3) The Standard Form 50 was signed on 13 June 1961, four days after the effective date of the removal. This should have been issued and signed prior to the effective date of the action. See reference (h).

d. Advance Notice of Proposed Removal

(1) Reference (i) requires that an advance notice shall state any and all reasons for the proposed adverse action specifically and in detail, including dates, specific instances and other data sufficient to enable the employee to fully understand the charges and to adequately join issue with the proposed action. The criteria usually applied to the specificity requirement is that the innocent who has no knowledge of the circumstances surrounding the charges will have sufficient information upon which to understand and take issue with the charges. After reviewing all of the

material available, it is believed that the activity could have been more specific in citing the charges by giving approximate dates and locations of the specific actions. This would have materially enhanced the station's position with respect to this requirement.

H. D. LANGLEY
By direction

Copy to:
CIR 210

Memorandum from Secretary of the Navy to Commanding Officer, U.S. Naval Air Station, Patuxent River, Maryland, Dated 1 December 1961, Entitled "Subj. George A. Connelly; Grievance Appeal from Removal Action"

1 Dec. 1961

From: Secretary of the Navy

To: Commanding Officer, U. S. Naval Air Station, Patuxent River, Maryland

Via: Chief, Bureau of Naval Weapons

Subj: George A. Connelly; grievance appeal from removal action of

Ref: (a) BUWEPS ltr of 14 Sep 1961 (DCP-5:ACM)
(b) NCPI 750.6-4

1. Subject appeal has been reviewed and is sustained because it is considered that the procedure followed in effecting the removal was fatally defective.

2. In this connection, it is noted that the defects in procedure were brought to your attention by reference (a).

3. It is requested that appellant be offered restoration to duty. Should appellant accept restoration to duty, such restoration should be retroactive to the date of removal, and appellant will be eligible for back pay under Public Law 623.

4. In connection with the foregoing, the provisions of reference (b) provide that, when an individual is restored to duty on a finding of procedural defect, the employing activity may initiate new and procedurally correct action.

5. A brief report as to the disposition of this case is requested to complete the record.

M. J. LAWRENCE
M. J. Lawrence
By direction

APPENDIX B

Letter Written on August 22, 1967 by the Honorable Kimball Johnson, Director, Bureau of Personnel Investigations, Civil Service Commission, to Several Members of Congress Regarding Current Civil Service Commission Policies and Procedures in Cases Involving Alleged "Immoral or Indecent Conduct"; Together With Covering Letter Dated September 12, 1967 from the Commission to Counsel for Appellant

UNITED STATES CIVIL SERVICE COMMISSION
BUREAU OF PERSONNEL INVESTIGATIONS
WASHINGTON, D. C. 20415

Sept. 12, 1967

Mr. Edward L. Merrigan
Suite 1000, Mills Building
1700 Pennsylvania Avenue N.W.
Washington, D. C. 20006

Dear Mr. Merrigan:

In accordance with your letter of September 5, attached is a copy of the letter you requested.

Sincerely yours,

WALTER I. WALDROP
Walter I. Waldrop
Acting Director

Enclosure

Aug. 22, 1967

On July 31, 1967, Mrs. Phyllis L. Chesnutt of 7700 Martel Place, Springfield, Virginia, 22150, wrote you expressing dissatisfaction with Commission investigations. She made specific reference to questions asked her by one of our investigators who interviewed her concerning a long-time acquaintance. Mrs. Chesnutt forwarded a copy of the letter to me and to various other persons.

On receipt of Mrs. Chesnutt's letter, a detailed check was made into the conduct of the questioned investigation. We re-interviewed Mrs. Chesnutt and a number of the other witnesses who had been interviewed during the course of this investigation. Although the other witnesses reported no improper questions, we established that our investigator did question Mrs. Chesnutt in a manner that implied that the subject of the investigation had borne a child out of wedlock. The question was highly improper, is indefensible, and such questions are clearly prohibited by both oral and written instructions given all Commission investigators.

The investigator has been officially reprimanded for asking the improper question and he has been warned that any future violation of a similar nature may result in a more severe penalty, possibly removal. We have advised Mrs. Chesnutt of the results of our inquiry, of the action taken, and of our appreciation to her for bringing the matter to our attention.

Please be assured that the Commission is most concerned that our investigations are conducted in such a way as to give maximum protection to the individual rights and privacy of those investigated. Our procedures call for continuing checks by supervisory personnel to ensure that all Commission investigators comply. These checks include re-interviews with some of the witnesses interviewed by each investigator. We are happy to report that we rarely

find any indication that improper questions are asked or that the investigator has by implication aroused suspicions regarding a person being investigated. Our investigative reports are post audited and reviewed for completeness and quality. If this review indicates a violation of good investigative procedure these shortcomings are brought to the attention of the investigator and his supervisor for correction or training. We are prompt to discipline any investigator when our instructions are violated.

We are continually conscious and conscientious in our efforts to avoid incidents such as this one of which you write. Maintaining an image of objectivity, fairness, and neutrality has become increasingly challenging to all levels of our investigative staff because of the critical arena in which we are now functioning, both in the courts of law and the courts of public opinion.

These matters are being stressed in our periodic conferences of investigators and supervisors. We strive constantly to foster full understanding of the problems of unwarranted invasion of privacy and the importance not only of doing that which is right but of avoiding the very appearance of any unwarranted infringement upon individual rights and privacy.

Our instructions to Commission investigators are principally in positive terms of what they can and should do to conduct investigations properly. By their nature they include some admonitions and some outright prohibitions.

The following are selected examples of admonitions from our investigator handbook and a list of the major prohibitions to be observed:

In conducting the investigation, the investigator will maintain a fair, impartial, and objective attitude toward the subject or matter being investigated. Under no condition will he be influenced by political, religious, or racial prejudices or considerations. He will avoid forming a theory

or fixed opinion based on information developed early in the investigation, and then try to develop information that coincides or supports his ideas. Even though the information developed points strongly to a certain conclusion, he will maintain an open mind to information that points to a different conclusion. Such information will be weighed carefully to determine what additional investigation is necessary in order to assure that the report of investigation will reflect pertinent facts concerning both sides of the matter at issue.

In addition to being fair-minded and impartial, the investigator must conduct himself and the investigation in such a way that these qualities are apparent to all with whom he comes in contact. He should have distinctly in mind the possibility of a misinterpretation of his remarks, acts, and motives. Never should he leave the impression that he is personally interested in the outcome of the investigation, nor should he express his personal opinion of the subject of investigation. The investigator will remember that his official remarks and actions may be regarded as evidence of the Commission's attitude towards people.

Unless there are indications, charges, or reasonable suspicions that the subject is lacking in some fundamental requirement, the investigator will not probe into the intimacies of his private life for the purpose of developing evidence of minor shortcomings which will not materially affect his fitness for the position. If the investigation establishes that the subject is of good character and reputation, the investigator should not make a deliberate effort to show that some time in his life the subject was guilty of an indiscretion. Neither should he establish in his own mind unreasonably high, artificial or idealistic standards of conduct and then consider as unsuitable all persons who do not measure up to these standards.

Cases involving questionable morality raise special problems because the morals of an individual are generally

considered to be his own private affair. Also, there is a wide variation of views in our society, both between individuals and social groups, as to what constitutes immoral conduct. The problem is complicated further by laws pertaining to moral conduct which vary considerably from state to state. In addition, individual cases of immorality frequently are not matters of general knowledge; this makes the danger of spreading derogatory information imminent.

Every effort is made to indoctrinate all investigators with these principles. They are constantly brought to the investigator's attention through regular retraining programs.

The tone of Mrs. Chesnutt's letter raises an inference that the bearing of an illegitimate child has special significance as to suitability or security. Under Commission policy this fact in itself is not considered a disqualification. Under Commission standards immoral conduct is significant only when accompanied by notoriety, scandal or public censure. All factors in each case are treated objectively and sympathetically. The age of the subject, general moral behavior, and the recency of the event all have bearing in our decisions. In any event, the youthful mistakes of naive, immature adolescents are not perpetually held against them in our considerations.

We are corresponding with others who received copies of Mrs. Chesnutt's letter.

Sincerely yours,

KIMBALL JOHNSON
Director

INW:JGCampbell:ad

Enclosure

APPENDIX C

Excerpts From Navy Civilian Personnel Instructions

NCPI 750

INSTRUCTION 750

DISCIPLINARY ACTIONS AND PROHIBITIONS

Section 2. General Provisions

2-1. SCOPE AND COVERAGE.

a. General.

The provisions of this Instruction are concerned primarily with adverse actions taken against employees because of their misconduct. However, the procedures outlined in this Instruction may be used when effecting adverse actions authorized by other Navy Civilian Personnel Instructions. This Instruction also covers general prohibitions relating to the conduct of Navy employees.

b. Applicability.

This Instruction applies to all U. S. citizen civilian employees of the Navy and Marine Corps departmental and field services, except civilian marine personnel of the Military Sea Transportation Service. . . .

2-3. GENERAL PRINCIPLES.

c. Determining the facts.

(1) The primary function of disciplinary procedure prior to decision is to determine the facts, not to provide a means for prosecuting the employee.

(2) A prima facie case against the employee must exist before disciplinary action is initiated. A prima facie case is one established by sufficient evidence to justify a presumption of guilt beyond a reasonable doubt.

(3) The employee must be confronted with all the evidence that influences management's consideration of the case and must be permitted to defend himself against such

evidence prior to decision regarding the action to be taken. When disciplinary action (including removal, suspension or demotion) is contemplated by management on the basis of classified information, the facts warranting such action must be developed in unclassified form, by separate investigation if necessary, so that the employee can be confronted with the reasons for the adverse disciplinary action.

(4) It is management's responsibility to ascertain all pertinent facts prior to making a final decision and to uncover and attach due weight to factors supporting the employee's position whether or not the employee offers such factors in his own defense.

d. Determining the penalty.

(1) The penalty imposed or assigned shall be the minimum which may reasonably be expected to correct the employee and maintain general discipline and morale.

(2) The employee's work history, character, and potential should be considered in determining the severity of the penalty.

(3) The cost of removing the employee and recruiting and training another person should be weighed in terms of the cost of intensive reorientation of the employee whose removal is contemplated.

(4) The denial of charges which are later established will not be the basis for increasing the penalty nor for additional charges.

Section 5. Procedure

5-1. General Statement.

a. The procedures described in this section relate solely to disciplinary actions and must be used whenever disciplinary action is taken against a Navy employee. . . .

5-5. HEARINGS. . . .

b. General conditions.

Hearings shall be held whenever action is taken under Procedure "B" and the employee requests such hearing in his reply to charges. Hearings may be held, in the discretion of management, when the employees fails to request such hearing, if it is believed that hearing the case will lead to a better understanding of the issues and more equitable action. Hearings, when requested, should be scheduled as promptly as possible. If an employee fails to give adequate notice or to request a postponement within a reasonable time prior to convening of the hearing, he may be required to present his own case in the absence of representation or witnesses. . . .

STANDARD SCHEDULE OF DISCIPLINARY OFFENSES AND PENALTIES FOR CIVILIAN EMPLOYEES IN THE NAVAL ESTABLISHMENT

Instructions for Use of Schedule

1. This list is not intended to cover every possible type of offense. Penalties for offenses not listed will be prescribed by the head of the activity consistent with penalties for offenses of comparable gravity.

2. Many of the items listed on this schedule combine several offenses in one statement, connected by the word, "OR." Therefore, when drawing up charges, use only that part of the applicable item on the schedule which actually describes the offense under consideration. Do not use the word, "OR," in a charge; usage of this word in a charge makes it nonspecific. (See NCPI 45.4-3*a*.)

3. Penalties for disciplinary offenses will, in general, fall within the ranges indicated. In unusual circumstances, depending on ★ the gravity of the offense, the past record, and the position ★ of the employee, a penalty either more or less severe than the max or min range, provided for herein, may be imposed.

4. Depending on the severity of the offenses, removal proceedings may be instituted against an employee for any four offenses committed in any 24 months' period which include two or more offenses of this schedule, or for the fourth occurrence of the same offense within the reckoning period for that offense.

5. Reckoning periods are not cumulative.

6. Where appropriate, consideration may be given to demotion in lieu of removal.

7. The suspension penalties listed herein are applicable to work days only. (Caution: Section 14, Veterans' Preference Act of 1944—"Suspended for more than 30 days" is interpreted to express calendar days.)

Range of Penalties for Stated Offenses

(Reprimands — Suspensions — Removals)

	Number of occurrences in reckoning period							
	1st		*2nd*		*3rd*		*Reckoning Period*	*Remarks*
Nature of Offense	*Min.*	*Max.*	*Min.*	*Max.*	*Min.*	*Max.*		
26. Immoral, Indecent, or Notoriously Disgraceful Conduct	*Reprimand*	*Removal*	*15 days*	*Removal*	*Removal*	*Removal*	*2 years*	

(GOVERNMENT) APPELLEES' BRIEF AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. ~~21,805~~

GEORGE A. CONNELLY, APPELLANT,

v.

SECRETARY OF THE NAVY, *et al.*, APPELLEES.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID G. BRESS.
United States Attorney.

FRANK Q. NEBEKER.
GIL ZIMMERMAN.
Assistant United States Attorneys.

C. A. No. 21,33-64

COUNTERSTATEMENT OF QUESTIONS PRESENTED

Appellant, a non-veteran civil service employee, was finally discharged by the Navy upon conclusion of its *second* removal proceedings in his case. In those *second* proceedings, appellant initially requested a hearing under the applicable Navy regulation. Then, he sent the Commanding Officer an impertinent memorandum "abrogating", on advice of retained counsel and for patently contrived reasons, his earlier request for hearing. In light of appellant's deliberate waiver of hearing, the Commanding Officer acted in the case. The affidavits of the two young Navy enlisted men involved, detailing appellant's active solicitation of them as his homosexual partners, and his participation with them in seven homosexual acts, essentially provided the evidentiary basis for the discharge action.

In view of the foregoing, the main question presented, in the opinion of appellees, is as follows:

1) Did appellant's deliberate waiver of hearing not properly permit the Navy under the Lloyd-LaFollette Act and the applicable Navy regulation to consider as competent evidence in its *second* removal proceedings the sworn statements the two young Navy enlisted men made in their affidavits, and to give credence to that evidence in effecting his final discharge?

The subsidiary questions presented, in the opinion of appellees, are:

2) Were the second Navy removal proceedings otherwise procedurally in accord with law?

3) Does the challenged Navy discharge action have a sufficient "rational basis in the evidence", and is it arbitrary or capricious?

INDEX

TABLE OF CASES

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*Cases chiefly relied upon are marked with asterisks

Cases—Continued

OTHER REFERENCES

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,805

GEORGE A. CONNELLY, APPELLANT,

v.

SECRETARY OF THE NAVY, *et al.*, APPELLEES.

ON APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF ON BEHALF OF APPELLEES

COUNTERSTATEMENT OF THE CASE

This is an appeal from the judgment entered April 14, 1967 by the District Court (per McGarraghy, J.) for Government appellees in a civil service employee discharge case arising under the Lloyd-LaFollette Act.[1] Appellant is seeking reinstatement in this litigation.[2]

The District Court heard argument on cross-motions for summary judgment, and reviewed the certfied administrative records. So advised, the District Court denied appel-

[1] The provisions of the Lloyd-LaFollette Act (and regulations issued thereunder) apply, inasmuch as appellant is a non-veteran. The pertinent provisions in Section 6(a) of the Lloyd-LaFollette Act, as amended, formerly 5 U.S.C. 652(a), currently 5 U.S.C. 7501, in effect at all times relevant to this litigation, appear *infra* (at A3).

[2] Appellant's companion suit in the Court of Claims, Ct. Cl. No. 108-65, seeking back pay, is against the United States. Further proceedings in that suit have been suspended, pending disposition of the present litigation.

lant's motion; granted Government appellees' cross-motion; and dismissed the action. (JA 55.)[3]

INTRODUCTION

Appellant is a non-veteran. He was employed by the Department of the Navy in a civil service position as a Fire Fighter at the United States Naval Air Station, Patuxent River, Maryland. Two Navy removal proceedings were conducted in his case by the Patuxent Naval Air Station facility: the *first* was voided by the Secretary of the Navy for procedural deficiency; the *second* culminated on February 16, 1962 in final discharge of appellant on a finding that he had committed seven charged homosexual acts with two young Navy enlisted men. It is the *second* Navy removal proceedings which are before the Court for limited judicial review on this appeal.

A. The abortive *first* Navy removal proceedings

Upon conclusion of the *first* removal proceedings, appellant was discharged effective June 9, 1961. He appealed under the Navy's Internal Grievance Procedure.[4] On December 1, 1961 the Secretary of the Navy sustained the grievance appeal; voided the Commanding Officer's discharge action of June 9, 1961; and authorized reinstatement and back pay. However, the Secretary directed attention to the provision in the applicable Navy regulation authorizing

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[3] Our designations herein are as follows: "JA" refers to the printed Joint Appendix; "Ex" refers to the exhibits in the "Exhibits in Lieu of Printing"; "Govt Ex" refers to the Government exhibits filed in the District Court, which constitute the certified administrative records in this case; "A" refers to the Appendix hereto; "Br" refers to appellant's brief on this appeal; and "Tr" refers to the transcript of the argument of counsel before the District Court April 5, 1967 on the cross-motions for summary judgment.

[4] The governing Navy regulation in effect at all times relevant to this litigation was Navy Civilian Personnel Instructions 750. This regulation appears *infra* at A5, et seq. It gave all Navy civil service employees the right of appeal to the Secretary of the Navy on procedural grounds, as well as on the merits of the discharge. We hereinafter refer to this regulation as "NCPI 750."

initiation of "new and procedurally correct" removal proceedings. (Exs 2 & 8.) So reinstated, appellant resumed active duty on December 21, 1961, and received back pay for the period of his separation. Thus, the *first* removal proceedings were voided *ab initio*. Appellant was then fully on notice that the Patuxent Naval Air Station facility intended to initiate new and procedurally correct removal proceedings in his case. (Exs 2 & 5.)

B. The *second* Navy removal proceedings culminating in appellant's final discharge

On January 25, 1962 the Commanding Officer, Patuxent Naval Air Station, commenced proceedings anew to remove appellant from his civil service position. A new, detailed notice of charges was then served upon him. As indicated, the specifications were that appellant had committed seven charged homosexual acts with two young Navy enlisted men. These were Donald L. Etheridge and William Coyle. One affidavit executed by Etheridge, and two affidavits executed by Coyle, were served upon appellant with the new notice of charges. (Ex C.)

In his initial response of January 30, 1962 to this new notice of charges, appellant requested a hearing, and indicated that he would advise at a later date who would represent him at that hearing. (Ex 6.) But on February 1, 1962 appellant deliberately, on advice of counsel, and for express reasons, withdrew his request for hearing in these *second* Navy removal proceedings. (Ex G.)

The Commanding Officer thereupon reviewed the matter and notified appellant of his decision on February 8, 1962. The Commanding Officer specifically considered appellant's reply expressly waiving, on advice of counsel, and for specified reasons, his right to hearing in the *second* Navy removal proceedings. These sworn statements essentially supplied the factual basis for appellant's discharge. The Commanding Officer concluded that appellant had committed the homosexual acts with Etheridge and Coyle, as described in the notice of charges and accompanying affidavits of Etheridge and Coyle; that these unnatural sexual acts constituted immoral conduct; and that appellant's removal

should be effected in the best interests of the federal service. (Ex 6.)

Appellant was finally discharged on February 16, 1962 by the Patuxent Naval Air Station facility upon its conclusion of these *second* Navy removal proceedings. (Ex 7.) Appellant appealed on procedural grounds to the Civil Service Commission.[5] The Commission on August 12, 1962 denied the appeal, finding no procedural error. Appellant then filed an appeal on the "merits" to the Secretary of the Navy under the Navy's Internal Grievance Procedure.[6] The Secretary of the Navy on October 12, 1962 denied this appeal, finding the Commanding Officer's discharge action "warranted under the circumstances." Appellant sought discretionary reopening and reconsideration by the Commission. And on May 24, 1963 the Commission denied the request for reopening of the appeal. (Exs 6, 9, 10, 11.)

C. The District Court judgment

Appellant instituted this litigation on August 31, 1964. At the argument on the cross-motions for summary judgment held April 5, 1967, the District Court made clear the essential basis for its decision against appellant: The proceedings under judicial review were the *second* Navy removal proceedings. Appellant had expressly waived his right to a hearing in those second removal proceedings by his memorandum of February 1, 1962. (Ex G.) Accordingly, the Commanding Officer was entitled to rely on the affidavits of the two Navy enlisted men involved, Etheridge and Coyle.

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[5] The Civil Service Commission is hereinafter (sometimes) referred to as the "Commission" or the "CSC." The pertinent CSC regulations in effect at all times relevant to this litigation, governing the discharge of non-veterans from civil service positions, appear *infra* (at A4). Insofar as material here, these regulations conferred on a non-veteran the right to appeal to the Commission on grounds of procedural deficiency only; the "merits" were not open to Commission review.

[6] NCPI 750.5-3e provided that any issues previously entertained by the Commission under its own proper statutory authority would not be open to consideration on the appeal under the Navy's Internal Grievance Procedure.

And these affidavits constituted a sufficient case to warrant the Navy to go forward with the discharge proceedings. (Tr 7, 11-15, 41.)

The colloquies between Court and counsel reflected in the transcript of the argument on the cross-motions for summary judgment are to be considered in the light of the fact that Judge McGarraghy had reviewed the administrative records and the memoranda beforehand, and the further fact that the main contention which we advanced in this connection in our memorandum brief before the District Court was precisely (p. 5):

> This express waiver by plaintiff [appellant here], on advice of counsel and for these specified reasons, of the right to a hearing in the Navy's second removal proceedings, entitled the Navy under the governing Lloyd-La Follette Act provisions and its own applicable regulation to consider as competent evidence in these second removal proceedings the sworn statements adverse to plaintiff made by Etheridge and Coyle in their affidavits.[7] The Navy considered their adverse statements to be credible evidence. And these statements, essentially, supplied the factual basis for plaintiff's discharge.

D. Appellant's misrepresentations and distortions as to the District Court judgment, the record facts and other matters

If we correctly understand the import of the attack appellant is making on the District Court action (br, 2, 20), he is now claiming that the District Court's order is "unexplained," and that he is so in the dark as to the effective basis for its decision, that—

> it is difficult [for him] to fathom why the district court, presented with the uncontradicted facts and circumstances here involved, failed to *** set aside appellant's patently invalid discharge; or why the district court, *without voicing any reason or opinion*, summarily dis-

[7] At this point, we cited in our fn. 8: "See 5 U.S.C. 652 and NCPI 750.5-3(d) and 750.5-5a,b,e,f(2)."

missed appellant's complaint herein and granted appellees' motion for summary judgment.

[Appellant's emphasis in original.]

We believe this misrepresents the District Court action. The District Court's colloquies with counsel at the argument on the cross-motions for summary judgment made known the essential basis for its concurrence with our view that appellant's entire case founders on the reef of his own deliberate waiver of hearing in the *second* Navy removal proceedings, on advice of counsel, and for stated reasons. Further, as developed in our memorandum brief before the District Court, and as discussed *infra*, appellant's stated reasons for withdrawing his request for hearing were palpably contrived.

As for appellant's claim that the "facts" he asserts are "uncontradicted," we note this: We filed in the District Court a statement in opposition to his statement of facts. We therein controverted in important particulars appellant's incorrect "facts." (JA 52-55.) Nevertheless, appellant has now imported these same incorrect "facts" into his brief on this appeal. He has done this by inserting in the Joint Appendix (JA 22-39) the same statement of incorrect "facts" which we controverted before the District Court, and then reciting therefrom in his brief on this appeal.[8]

Moreover, in his brief on this appeal, appellant thoroughly confuses the facts of record in the *second* Navy removal proceedings, with the abortive *first* Navy removal proceedings. (Br, 2-16.) He also errs egregiously in contending (br, 13) that the removal decision was reached in the second Navy removal proceedings "without *** evidence to support the charges levelled against appellant ***."

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[8] We particularly take exception to his claim (br, 8, fn.3) that "it appears from the record *without dispute or contradiction*" that Etheridge and Coyle "were endeavoring to gain their release from the Navy." [Appellant's emphasis in original.] As developed *infra*, this flies directly in the teeth of the certified administrative records. We pointed this out below in our statement in opposition. (Pars. 1-3.) And we also pointed this out at the argument on the cross-motions for summary judgment. (Tr, 43-44.)

Appellant further errs (br, 15, fn. 4) in asserting that the memorandum from the Secretary of the Navy to the Commanding Officer, Patuxent Naval Air Station, dated December 1, 1961, does not appear in the certified administrative records. Finally, he errs in claiming (*idem*) that the omission from the certified administrative records of the memorandum (letter) dated September 14, 1961 by which the Chief, Bureau of Naval Weapons, brought to the attention of the Commanding Officer the procedural deficiencies in the abortive *first* Navy removal proceedings "effectively deprived the District Court of *** crucial evidence."[9]

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[9] We note that appellant has improperly included this letter as Exhibit 12 in his "Exhibits in Lieu of Printing". He has also appended it as "Appendix A" to his brief on this appeal. And he attempts to make much of the fact that we had not included this memorandum (letter) in the certified records we filed below. (Br. 20.)

First, in our view, the District Court was not deprived of any "crucial evidence" by this omission. The memorandum (letter) in question shows quite clearly the lengths to which the Navy was prepared to go in according appellant a procedurally fair hearing in the *second* Navy removal proceedings, had appellant not waived hearing, on advice of counsel. Hence, it is additional cumulative evidence supporting the judgment rendered in favor of Government appellees. And, of course, there was no intent on our part to deprive the Court of any material evidence, by omission from the certified records, as appellant now intimates. (Br. fn.4.) The procedural deficiencies in the *first* Navy removal proceedings were fully explicated in our factual presentation before the District Court. (JA 42-44.)

Second, appellant really distorts the situation when he indicates that this memorandum "came to light only after the District Court entered the order from which this appeal was taken." Actually, appellant had been on notice of this memorandum ever since we filed (and served a copy on him of) the certified administrative records with our cross-motion for summary judgment on February 24, 1967. (JA 39.) Included therein was the memorandum dated December 1, 1961 (Ex 8) from the Secretary of the Navy to the Commanding Officer, Patuxent Naval Air Station. In that memorandum, the Secretary informed the Commanding Officer that appellant's grievance appeal in the abortive *first* Navy removal proceedings was being sustained because it was "considered that the procedure followed in effecting the removal was fatally defective." The Secretary

We believe these misrepresentations and distortions in appellant's brief on this appeal should not be permitted to divert the Court's attention away from the key facts on which, we think, this case turns. Accordingly, we will here concentrate on "setting the record straight" as to those facts we deem essential.

E. Appellant's deliberate waiver of hearing, on advice of counsel, in the *second* Navy removal proceedings for stated, patently contrived, reasons.

The Secretary of the Navy notified appellant by memorandum dated December 1, 1961 (Ex 2) that his grievance appeal in the abortive *first* Navy removal proceedings was being sustained.[10] This memorandum stated:

> 1. Your appeal has been reviewed and is sustained because it is considered that the procedure followed in effecting your removal was fatally defective.

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stated in paragraph 2 thereof: "In this conection, it is noted that the defects in procedure were brought to your [the Commanding Officer's] attention by reference (a)". Reference (a) was "BUWEPS ltr of 14 Sep 1961 (DCP-S: ACM.)"

At no time during the pendency of the cross-motions for summary judgment before the District Court (from February to April, 1967) did appellant request to be furnished this "BUWEPS ltr of 14 Sep 1961." Only after the District Court decided the matter against appellant, did appellant's counsel on June 22, 1967 write Government appellees' counsel, asking to be furnished this "BUWEPS ltr of 14 Sep 1961." (A13.) By letter dated July 7, 1967 Government appellees' counsel furnished this "BUWEPS ltr of 14 Sep 1961", but pointed out that "it would be improper * * * to seek reversal in the Court of Appeals of a District Court decision, on the basis of documents which were not before the District Court, and which by due diligence should have been presented (if material) to the District Court prior to the time its judgment finally vested." (A15.)

Third, while we think it is improper for appellant to bring this "BUWEPS ltr of 14 Sep 1961" to this Court's attention in the manner that he has, we hasten to add that we have no substantive objection to this Court now considering it. We deem that preferable to a remand of this case to the District Court for post-judgment consideration of inclusion of this memorandum (letter) in the record. Accordingly, we are now lodging a certified copy thereof with the Clerk of this Court.

[10] The procedural deficiencies in the abortive *first* Navy removal

> 2. In view of the foregoing, the Commanding Officer of the Naval Air Station is being requested to offer you restoration to duty.
>
> 3. For your information, should you accept restoration to duty, new and procedurally correct action to remove you may be initiated upon your return to duty.

(As we have already noted) the Secretary of the Navy also notified the Commanding Officer, Patuxent Naval Air Station, by memorandum dated December 1, 1961 of this decision on the grievance appeal invalidating the *first* Navy removal proceedings *ab initio*.[11]

The Secretary of the Navy's memorandum of December 1, 1961 to appellant put him squarely on notice (a) that the *first* Navy removal proceedings were invalidated *solely* on procedural grounds; and (b) that new and procedurally correct removal action might be initiated in his case if he accepted restoration to duty under the Secretary's grievance appeal decision. Further, he was put expressly on notice at the meeting he had with the Naval Air Station's Industrial Relations Officer, Employee Relations Officer and Fire Chief, when he resumed duty on December 21, 1961, that the Patuxent Naval Air Station facility planned to institute further removal proceedings in his case. (Ex 5.)[12]

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proceedings which led to this result are set forth in the "BUWEPS" memorandum (letter) of September 14, 1961. As indicated, we are lodging a certified copy thereof with the Clerk of this Court; and copies appear as Ex 12 and Appendix A to appellant's brief. Hence, we see no need to repeat these procedural deficiencies herein.

[11] We reemphasize that, in our view, the Secretary's directions to the Commanding Officer clearly contemplated that in the *second* Navy removal proceedings the Patuxent Naval Air Station facility would proceed anew in full accordance with all legal requirements.

[12] Appellant in his brief on appeal asserts as claimed "fact", the same conclusory allegations he set forth in his statement below, that when he resumed duty, he "was treated as a pariah" and "intentionally subjected to continuous humiliation and disgrace". He bases these claimed "fact" statements on his having been then assigned to work at the Solomons Island Fire Station, rather than at the Patuxent Navy Base Fire Station, where he had been previously assigned. (Br. 10-11.) In our view, these claimed "facts"

(As we have also observed) the *second* Navy removal proceedings were commenced on January 25, 1962 by the service upon appellant of a new, detailed notice of charges.[13]

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are immaterial here; but we deem it our duty not to let them go unchallenged on the record.

In our statement in opposition below we stated (in par. 5): "Plaintiff's claim that he was treated as a pariah, *etc.* is irrelevant and immaterial. In any event, it appears to have no basis in fact; see enclosures 6-8 included in the certified records of the Department of the Navy. If material, we traverse this claim."

Enclosure 6 to the certified Navy records (Govt Ex 2) appears as Ex 5 on this appeal. This transcript of the discussion had with appellant on December 21, 1961 discloses that: The Navy's stated purpose for then assigning appellant to the Solomons Island Fire Station was to spare him from the embarrassment of encountering persons on the base who knew him, and who had abused him in the past, and to protect him from possible violence. When this was explained to appellant, he immediately agreed. It was suggested that, since he was a bachelor, he might like to move to Solomons Island, or, that he could drive, there being "a lot of people who come and go that way."

Nothing in the certified records supports the claim (br. 11) that appellant complained of this assignment as "unfair and wrong"; or that "his superiors mockingly referred to him as a 'bachelor' and stated he shouldn't mind being alone" at Solomons Island; or that this was done "arbitrarily and capriciously". Indeed, the transcript indicates that appellant expressed no disagreement whatsoever as to this assignment; that at the close of the discussion he wished all present a Merry Christmas; and that all then shook hands.

Moreover, the certified Navy records (Govt Ex 2) contain as enclosures 7 & 8 the affidavits of the Chief, and another Fire Fighter, assigned to the Solomons Island Fire Station. These disclose that they rode together with appellant to and from the Solomons Island Fire Station during the period of his reinstatement, and that he at no time expressed "any dissatisfaction with his working place or manner of transportation." The Chief added (in substance) that, since he was then appellant's immediate supervisor, he would have been the proper person for appellant to discuss the matter with, had appellant been dissatisfied, as now claimed.

Thus, we conclude, there is no factual foundation in the certified records for this attack on the Navy's action.

[13] *Inter alia*, appellant is here complaining (br, 20-21) that the initiation of the *second* Navy removal proceedings on January 25, 1962—being some 35 days after he resumed duty on December 21, 1961—constituted a violation of NCPI 750.6-4(b). That regulation

This new notice of charges (Ex C) proposed appellant's discharge for "the commission of homosexual acts, which, if true, would constitute immoral conduct." The specifications charged appellant with the commission of two homosexual acts with Etheridge and five with Coyle. He was informed that Etheridge and Coyle were former enlisted men attached to the Patuxent Naval Air Station. Incorporated into and served with this new notice of charges on January 25, 1962 were one affidavit executed by Etheridge and two affidavits executed by Coyle. The specifications and affidavits (combined) detailed the facts of the seven unnatural sexual acts which the new notice charged appellant had committed with Etheridge and Coyle.

In the new notice of charges dated January 25, 1962 the Commanding Officer informed appellant that he might "reply personally and/or in writing" to the charges and "furnish affidavits in support of" his reply. He was further informed that he could "request a formal hearing at which * * * [he might] * * * be represented by any two persons of * * * [his] * * * choice and * * * call a reasonable number of witnesses." (Ex C.) By memorandum dated January 30, 1962 appellant initially requested such a hearing on the new charges, and stated that he would advise "at a later date" who would represent him at that hearing. (Ex. 6.)

However, on February 1, 1962 (Ex G), appellant withdrew his request for hearing by writing another memorandum to the Commanding Officer. He indicated therein that he had obtained legal advice since writing the memorandum of January 30, 1962. And he then specifically stated: "I

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provided that the "new and procedurally correct" removal action "should normally be initiated within 15 days after the date the *** removal is cancelled." As discussed in our argument *infra*, we deem this objection to be wholly without merit. But, we add, it appears indisputably from the record facts that appellant was fully on notice, at the very moment he resumed duty on December 21, 1961, that new removal proceedings were to be initiated in his case. And judicial notice may be taken of the fact that a Christmas-New Year holiday period intervened between the date of reinstatement and the date of initiation of the new removal proceedings in appellant's case.

am hereby abrogating my memorandum [of January 30, 1962] and pray that you take no notice of my request for a formal hearing." His two stated grounds for "abrogating" his request for a hearing were: (1) that "a hearing would serve no useful purpose as no new charges were presented, and * * * [he had] * * * already successfully answered the old charges"; and (2) that the new proceedings "to re-dismiss * * * [him] * * * from service on an identical set of charges is an undisguised attempt to nullify the orders of higher echelon and a deliberate case of placing * * * [him] * * * in double jeopardy." And he impertinently concluded as follows:

> I request that you see fit to put an immediate arrest to the illegal and improper personnel action which, if allowed to go through, threatens to jeopardize my interests. Failing your rescinding the illegal action, I wish to advise you that I will be compelled to take appropriate legal steps to protect my job rights and seek such legal action against any and all persons acting singly or in joint conspiracy to defame me by their false, pernicious and damaging accusation.
>
> If further communication or correspondence is required in regard to this matter, please refer it to my attorney * * * [name of attorney] * * *. His telephone number is * * * [telephone number] * * *.

It is clear on the record here that appellant's claim that the *second* Navy removal proceedings were "an undisguised attempt to nullify the orders of higher echelon" and placed him "in double jeopardy" was patently contrary to the facts of the case then known to him. So, too, his claim that he had "already successfully answered the old charges" was then know by him to be baseless, since the Secretary of the Navy's invalidation of the *first* Navy removal proceedings had been grounded exclusively on procedural deficiency, not on the "merits".

Furthermore, it is also clear on the record here that appellant's claim a new hearing would "serve no useful pur-

pose as no new charges were presented" was also patently contrary to the facts of the case then known to him. Appellant was charged in the *second* Navy removal proceedings with an entirely new specification, the commisison of a fifth homosexual act with Coyle. This was based on a new affidavit Coyle executed on July 12, 1961. (Ex F.) No like specification had been charged in the abortive *first* Navy removal proceedings; it could not have then been charged, since the incident (as charged) occurred on June 14, 1961, subsequent to appellant's original discharge on June 9, 1961.

Coyle's new affidavit of July 12, 1961 was quite damaging to appellant. As noted, it detailed appellant's participation with Coyle in an unnatural sexual act on the night of June 14, 1961. In it, Coyle averred: On that night appellant stopped Coyle to talk to him. Appellant then showed Coyle a statement that Morrill[14] had "made for him" (appellant) repudiating his (Morrill's affidavit, and asked that Coyle make a similar retraction of his (Coyle's) affidavit, and try to get Etheridge to make a like retraction of his (Etheridge's) affidavit. Appellant told Coyle he would "make it well worth * * while" for Coyle if he would do so. Coyle refused, saying he was "not interested." They then "went to a couple of bars", and appellant "bought some

[14] In the abortive *first* Navy removal proceedings, appellant had also been charged with participating in homosexual acts with a third young Navy enlisted man named Robert C. Morrill, as well as with Etheridge and Coyle. However, Morrill subsequently repudiated the statements made in his (Morrill's) affidavit. Accordingly, in its new notice of charges of January 25, 1962 commencing the *second* removal proceedings the Navy omitted all reference to Morrill. But Coyle's new affidavit of July 12, 1961 indicated that Morrill had been induced by appellant to repudiate his (Morrill's) affidavit. And appellant faced the prospect of embarrassing cross-examination in the *second* Navy removal proceedings if he insisted on a hearing, concerning Coyle's sworn statements that appellant had solicited Coyle to repudiate his (Coyle's) earlier affidavit, and to get Etheridge to repudiate his (Etheridge's) affidavit; and that on the night of June 14, 1961 appellant and Coyle had been out together in a public place drinking beer and had then participated in another homosexual act in appellant's automobile.

beer." Then, they drove around for a while in appellant's automobile. After some homosexual conversation, appellant and he participated in an unnatural sexual act, for which appellant gave him two dollars. "This took place on a road just outside of Leonardtown." And appellant then drove Coyle back to the place where he (appellant) had stopped him (Coyle).

It is also to be noted that on Febrary 1, 1962 when appellant, acting with legal advice, decided to "abrogate" his request for hearing in the *second* Navy removal proceedings, he was on notice that Coyle, in executing his new affidavit of July 12, 1961, had waived his "Article 31" privilege against self-incrimination. Hence, he was then aware that Coyle, at least, might no longer refuse to testify relating to his participation with appellant in homosexual acts, on claim of self-incrimination, if he appeared as a witness at the hearing held on appellant's request in the *second* Navy removal proceedings.[15]

On his procedural appeal from the Commanding Officer's discharge action in the *second* Navy removal proceedings, appellant specifically abandoned before the CSC Regional Appeals Officer one of the two reasons he had originally advanced as his basis for "abrogating" his initial request for a hearing. He then conceded "that the employing activity could initiate procedurally correct action despite his [the Secretary of the Navy's] dismissing the case once for procedural infirmity." And appellant then went on to modify his remaining original reason for withdrawing his request for hearing, by stating: "Upon advice received appellant cancelled his request for * * * hearing * * *. The Charge against him not being in consonance with that required under the Civil Service Regulations or the Navy's Civilian

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[15] Article 31 of the Uniform Code of Military Justice, 10 U.S.C. 831, affords a privilege against self-incrimination akin to that provided by the Fifth Amendment to the Constitution. In the abortive *first* Navy removal proceedings, Etheridge, Coyle and Morrill had each invoked his "Article 31" privilege against self-incrimination at the hearing held on May 31, 1961, when questioned relative to the homosexual acts he had participated in with appellant.

Personnel Instructions, the appellant didn't see any reason in making a second defense against the same charges, written exactly in the same manner, as before." (Ex I.)

Subsequently, on his petition for discretionary reopening and reconsideration before the Commission itself, appellant advanced two claims in this connection which, we believe, are mutually inconsistent: (1) He claimed that the refusal of Etheridge and Coyle to answer questions at the hearing held in his abortive *first* Navy removal proceedings on May 31, 1961 deprived him of his right of cross-examination under the governing Navy Regulation in the *second* Navy removal proceedings. (2) He also claimed that in the *second* Navy removal proceedings he had "cancelled his request for another hearing on the grounds that it would be meaningless and would serve no useful purpose, thus, in effect, standing on the hearing record of May 31." (Ex K.)

F. The evidence supporting the final discharge action in the *second* Navy removal proceedings

The Commanding Officer, Patuxent Naval Air Station on February 8, 1962 entered his final decision to remove appellant in the *second* Navy removal proceedings. (Ex 6.) He considered appellant's express waiver of hearing, and reply to the charges, contained in appellant's memorandum of February 1, 1962 (Ex G). The Commanding Officer concluded "that * * * [appellant's] * * * conduct was immoral, and that * * * [he] * * * did commit homosexual acts with * * * Etheridge and * * * Coyle as described in the * * * notice [of charges] and in their statements, enclosures (1), (2), and (3), copies of which were furnished * * * [appellant] * * * with * * * [the] * * * notice * * * dated 25 January 1962." It was his decision that appellant should be discharged, and that such removal action was "in the best interests of the federal service."

Enclosure (3) to the Commanding Officer's decision was the seriously damaging affidavit Coyle executed on July 12, 1961. (Ex F.) This affidavit, as we have discussed, detailed a fifth homosexual act participated in by appellant and Coyle on June 14, 1961, subsequent to appellant's original

discharge in the abortive *first* Navy removal proceedings. Coyle stated therein that appellant gave him two dollars for this homosexual act. The affidavit also disclosed that appellant had sought to induce Coyle to repudiate Coyle's earlier affidavit, and to get Etheridge to retract his (Etheridge's) affidavit.[16]

Enclosure (2) to the Commanding Officer's decision was the earlier affidavit Coyle had executed on May 12, 1961. (Ex D.) It related Coyle's encounter with appellent about the middle of January 1961; his participation with appellant thereafter on four separate occasions in four homosexual acts, for each of which appellant gave him money, ranging from six to eleven dollars.

Enclosure (1) to the Commanding Officer's decision was the affidavit Etheridge executed on April 18, 1961. (Ex E.) It detailed his encounter, about 2 or 3 months before April 18, 1961, when he rejected a homosexual advance made upon

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[16] Coyle's second affidavit of July 12, 1961 was executed at a time when he had already admitted participation with appellant in four separate homosexual acts. Hence, appellant has no proper warrant to ascribe to him at that time special motivation to get out of the Navy. Nor, as of the time when Coyle executed his first affidavit on May 12, 1961, does the record support appellant's "fact" claim (br. 8) that Coyle "candidly admitted that he * * * had been trying to find a way out of the Navy." The testimony Coyle gave in this connection at the May 31, 1961 hearing held in the abortive *first* Navy removal proceedings was to this effect (Ex 3):

> Coyle had volunteered for a four-year enlistment, and had been in the Navy since November 30, 1959. Asked whether he liked the Navy, he responded: "Well, yes sir, it's all right." At the time of the hearing, he was "not now, not especially" trying to get out of the Navy before his enlistment was up. At an earlier time, there had been "some hardship difficulties" at his home, and he had put in a request for discharge, which was denied. On cross-examination, he was asked by appellant's counsel: You are not particularly anxious about staying in the Navy, are you?" Coyle responded: "It doesn't matter one way or the other."

Coyle's testimony further discloses that he was then 20 years of age, and that since he left "boot camp", he had served his entire tour of duty to that date at the Patuxent Naval Air Station.

him by appellant; followed by appellant continuing to call him up; thereafter, his participation with appellant on two separate, specified occasions in two homosexual acts, for each of which appellant paid him ten dollars. The affidavit also discloses that Etheridge was born March 29, 1943. Thus, at the time these two homosexual acts occurred, Etheridge was 18 years of age.[17]

G. Contentions raised on appeal, as to which appellant failed properly to exhaust administrative remedies

Appellant raises on this appeal the following contentions, which he had opportunity to raise, but never did, administratively, so as to give the Navy or the Commission proper opportunity to consider and rule (or, if warranted, to take appropriate corrective action) thereon:

1. The procedural deficiency claim that the Navy (allegedly) violated NCPI 750.6e(b) by not initiating the *second* Navy removal proceedings within 15 days of appellant's reinstatement. (Br, 20-21.)
2. The procedural deficiency claim that the Navy (allegedly) violated NCPI 750.2-3(c) by initiating the *second* Navy removal proceedings without a sufficient *prima facie* case. (Br, 21-22.)
3. The procedural deficiency claim to the effect that the Navy (allegedly) violated NCPI 750.5-5(b), in

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[17] The record completely refutes appellant's "fact" claim (br, 8, fn.3) that Etheridge was endeavoring to gain his release from the Navy. The testimony Etheridge gave in this connection at the May 31, 1961 hearing held in the abortive *first* Navy removal proceedings was to this effect (Ex 3):

> He had volunteered for a four-year enlistment, and had been in the Navy since August 1960. Asked whether he wanted to stay in or get out of the Navy, he responded: "I want to stay in if I can. I will fight to stay in every way I can." Before he got involved with appellant, he had never been in any trouble, in or out of service.

Etheridge's testimony further discloses that since leaving "boot camp" his entire tour of duty had been at the Patuxent Naval Air Station.

that the Commanding Officer abused his discretionary authority by not ordering a hearing in the *second* Navy removal proceedings—despite appellant's own express impertinent "abrogation" on advice of counsel and for stated reasons, of his request for a hearing. (Br. 17, 28.)

4. The substantive claim that (allegedly) a finding that the commission of homosexual acts constitutes immoral conduct is "insufficient and void". (Br, pp. 34-35.)
5. The substantive claim that (allegedly) the Commanding Officer's final decision was deficient in not setting forth the relationship between his fact-finding that appellant and the young Navy enlisted men involved had committed the homosexual acts described in the affidavits, and his determination that appellant's discharge was "in the best interests of the federal service." (Br, 36-37.)

H. The Civil Service Commission's official policy statement as to the unfitness for Government employment of persons who have engaged in homosexual acts.

The Commission on February 25, 1966 issued a statement (made generally available on April 20, 1966) fully articulating the official Government position in respect of the unsuitability or unfitness for Government employment of persons who have engaged in homosexual acts. (Ex L.) In substance, the Commission's view expressed therein is that persons, as to whom there is evidence that they have engaged in, or solicited others to engage in with them, homosexual (or other sexually perverted) acts, without evidence of rehabilitation, are not suitable for Government employment.

The Commission's well-considered policy statement includes the following observations:

> • • • Suitability determinations also comprehend the total impact of the applicant upon the job. Pertinent considerations here are the revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency, the apprehension caused

other employees of homosexual advances, solicitations or assaults, the unavoidable subjection of the sexual deviate to erotic stimulation through on-the-job use of common toilet, shower, and living facilities, the offense to members of the public who are required to deal with a known or admitted sexual deviate to transact Government business, the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth, and the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society.

* * * * *

* * * We must attribute to overt acts * * * the character ascribed by the law and mores of our society. Our authority and our duty permit no other course.

SUMMARY OF ARGUMENT

Under the permissible limited scope of judicial review in a civil service employee discharge case, the Navy's final discharge of appellant should be sustained as being in accord with law:

1. The Navy conformed procedurally to all applicable statutory provisions and regulations in its *second* removal proceedings in appellant's case.

There was no violation of the procedural requirements of the applicable Lloyd-LaFollette Act; appellant makes no such claim here. He bottoms his procedural claim here of a right to be accorded a hearing wholly upon the applicable Navy regulation.

But appellant deliberately, on advice of retained counsel and for specified reasons, waived his right to hearing (and concomitant right of cross-examination) under the Navy regulation.

Appellant's claim that—despite his own waiver—the Navy Commanding Officer nevertheless abused the discretion vested in him (the Commanding Officer) by not ordering a hearing anyway, necessarily fails.

First, appellant failed to raise this issue administratively; hence, the doctrine of exhaustion of administrative remedies forecloses him from now raising it, for the first time, before the courts.

Second, appellant's memorandum deliberately "abrogating", on advice of retained counsel, his earlier request for hearing, was impertinent, and the reasons given were patently contrived. Appellant thereby made it quite clear he wanted no part of any hearing, or the evidence it might have produced against him.

Hence, there was no abuse of discretion on the part of the Commanding Officer in acting upon the basis of appellant's deliberate waiver of hearing.

The Lloyd-LaFollette Act permits reliance on affidavits. Under appellant's waiver of hearing, the Navy regulation also permitted reliance on affidavits. Where a discharged employee fails to bring himself within the terms of the governing regulation, the decisional law (*Williams* v. *Zuckert* and cases following it) is also in accord, in permitting reliance on affidavits—even in Veterans' Preference Act discharge cases.

Accordingly, the Navy was entitled to rely in its *second* removal proceedings upon the sworn statements of the two "accusatory" Navy enlisted men, made in affidavit form. These affidavits, essentially, supplied the evidentiary basis for the discharge.

Appellant's claim of lack of specificity in the charges is unsubstantial. His remaining procedural claims are likewise unavailing. They are barred by the exhaustion doctrine; and they are also unsubstantial.

2. The Navy's removal action, upon conclusion of its *second* removal proceedings, is supported by ample "rational basis in the evidence", and is in no way arbitrary or capricious.

The affidavits of the two young Navy enlisted men involved, established appellant's active solicitation of them as his homosexual partners, and his participation with them in seven homosexual acts violative of the criminal law of the jurisdiction where they occurred.

There can be no doubt that, on the basis of this ample evidence in the record, the Commanding Officer correctly concluded that appellant's commission of these homosexual acts constituted "immoral" conduct warranting his discharge in the "best interests of the federal service." This decision is in accord with the official Government position articulated by the Civil Service Commission, relative to the unfitness for Government employment of persons who have engaged in homosexual acts; a Senate Committee study report; and the court decisions.

ARGUMENT

Appellant's discharge by the Navy on conclusion of its *second* removal proceedings was in accord with law.

A. INTRODUCTION: The scope of permissible review here is limited

It has long been the settled rule that the scope of permissible judicial review in civil service employee discharge cases is limited. *E.g.*, *Hargett* v. *Summerfield*, 100 U.S. App. D.C. 85, 88, 243 F.2d 29, 32, *cert. denied*, 353 U.S. 920 (1957); *Carter* v. *Forrestal*, 85 U.S. App. D.C. 53, 54-55, 175 F.2d 364, 365-366, *cert. denied*, 338 U.S. 832 (1949).

Appellant appears to concede this. (Br, 17.) However, if we correctly understand his argument, appellant is contending that such limited judicial review extends to determining whether the discharge action is supported by a "preponderance of the evidence." (Br, 19, 31.) Appellant errs in advancing this contention.

This Court recently reiterated the proper substantive standard of review in an employee discharge case: If there is a "rational basis in the evidence" for the administrative fact-finding determination on which the discharge action is based, this Court will not disturb it. *Mendelson* v. *Macy*, 123 U.S. App. D.C. 43, 47, 356 F.2d 796, 800 (1966). To the same effect is *Eustace* v. *Day*, 114 U.S. App. D.C. 242, 242-243, 314 F.2d 247, 247-248 (1962). And even if, on the administrative record, there were "ground for reasonable difference of opinion" as to whether a sufficient case for discharge has been established (and we firmly believe that

is not the case here), this Court has declared that it will "not substitute its judgment for that of the administrative agency." *Mendelson* v. *Macy*, *supra*; *Studemeyer* v. *Macy*, 116 U.S. App. D.C. 120, 121, 321 F. 2d 386, 387, *cert. denied*, 375 U.S. 934 (1963).[18]

As for procedure: If it appears that there was "substantial compliance" with the governing administrative regulations, this Court likewise will not disturb the discharge action. *Mendelson* v. *Macy*, *supra*, 123 U.S. App. D.C. at 48, 356 F.2d at 801; *Hargett* v. *Summerfield*, *supra*, 100 U.S. App. D.C. at 88, 243 F.2d at 32; *Saggau* v. *Young*, 100 U.S. App. D.C. 3, 4, 240 F.2d 865, 866 (1956). We think there was full compliance here.

With this limited scope of review in mind, we turn to the record in the present case. We shall develop that the Navy conformed procedurally in its *second* removal proceedings to all applicable statutory provisions and regulations, and that the evidence therein was plainly sufficient to sustain on limited judicial review the Navy's decision to discharge appellant.

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[18] *Pelicone* v. *Hodges*, 116 U.S. App. D.C. 32, 33, 320, F.2d 754, 755 (1963), phrased the applicable limited substantive standard as determining "whether the challenged [discharge] action was arbitrary or capricious or was supported by evidence." *Williams* v. *Brown*, Ct. App. Nos. 19,803 and 20,504, decided October 17, 1967, phrased this standard as "substantial support in the record." (Slip Op., p. 11.) We understand the Court to intend by these articulations to apply the same standard as it enunciated in *Mendelson*, *Eustace*, *Studemyer*, *supra* and other employee discharge cases.

In *Pelicone*, Section 14 of the Veterans' Preference Act of June 27, 1944, 58 Stat. 390, as amended, former 5 U.S.C. 863, currently 5 U.S.C. 7511, 7512, 7701, was the governing statute. Here, as we have noted (fn. 1 *supra*), the governing statute (because appellant is a non-veteran) is the Lloyd-LaFollette Act of August 24, 1912, 37 Stat. 539, 555, as amended, former 5 U.S.C. 652, currently 5 U.S.C. 7501. Under the indicated limited scope of permissible review in this Circuit, this Court apparently now applies the same limited substantive standard set forth above in veteran and non-veteran cases alike. While the two civil service statutes differ in the procedural protections they extend, their substantive protections are couched in identical language. No express judicial review function is assigned the courts by either statute.

B. The Navy conformed procedurally to all applicable statutory provisions and regulations in its *second* removal proceedings

The Lloyd-LaFollette Act, as amended, makes procedural provision only for a civil service employee subject to removal charges, to submit his case to the Agency on written answer, accompanied by affidavits. It expressly states that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer" taking the removal action. Hence, appellant can claim no violation of the procedural provisions in the Lloyd-LaFollette Act; nor is he doing so here.[19]

We understand appellant's procedural claim here (br, 14, 16, 27) of a right to be accorded a hearing, and the attendant right to cross-examine his "accusatory" witnesses thereat, to be bottomed wholly upon the applicable Navy regulation, NCPI 750.

NCPI 750.5-5(b) provided that a hearing "shall be" held if the employee subject to removal proceedings requests it

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[19] The principle is well-established that, absent any applicable statute or regulation, the Agency Head may summarily effect the discharge of a Government employee without even giving a reason for the dismissal. *Cafeteria, etc., Workers, etc.* v. *McElroy*, 367 U.S. 886, 896-897 (1961) (and cases therein cited); *Batchelor* v. *United States*, 169 Ct. Cl. 180, 183-184, cert. denied, 382 U.S. 870 (1965) (opinion by Mr. Justice Reed, sitting by designation).

Equally well-established is the principle, resting upon this traditional power of the appointing authority to remove Government employees at will, that—absent any statute or regulation conferring such right—a discharged Government employee has no right to have a hearing, at which he may cross-examine the makers of statements adverse to him, which are relied on by the Agency Head in discharging him. And the CSC regulations which accord Federal employees (only veterans during the period relevant to appellant's case, now veterans and non-veterans alike) a post-discharge hearing on appeal to the Commission, confer on the discharged employee only a limited right of cross-examination thereat. (Congress has never given the Commission subpoena power for purposes of such hearings.) *Williams* v. *Zuckert* (*1*) & (*2*), 371 U.S. 531 and 372 U.S. 765 (1963); *Devine* v. *Campbell*, 90 U.S. App. D.C. 171, 174-175, 194 F.2d 876, 879-880, cert. denied, 344 U.S. 826 (1952). *Cf. Cafeteria, etc. Workers, etc.* v. *McElroy, supra; Chafin* v. *Pratt*, 358 F.2d 349, 356-358 (5th Cir.), *cert. denied*, 385 U.S. 878 (1966).

in his reply to the notice of hearing. But appellant deliberately waived that right. The pertinent facts in this connection have been fully developed in our "Counterstatement of the Case" *supra*, and need not be repeated here. When appellant, on advice of retained counsel and for expressly stated reasons, waived his right to hearing in the *second* Navy removal proceedings, he of course waived his concomitant right to cross-examine his "accusatory" witnesses thereat.[20]

Appellant's claim here Br, 14, 27) is (in substance) that —despite his own impertinent "abrogation", on advice of retained counsel and for stated reasons, of his prior request for hearing—the Commanding Officer (allegedly) nevertheless abused the discretion NCPI 750.5-5(b) vested in him, by not ordering a hearing in the *second* Navy removal proceedings anyway. This claim necessarily fails.

First, neither before the Navy, nor on his procedural appeal to the Commission, did appellant raise any such claim. Hence, the doctrine of exhaustion of administrative remedies forecloses appellant from now raising it, for the first time, before the courts.[21]

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[20] See NCPI 750.5e and f(2). If appellant had not waived his request for hearing, the Navy would have been required "to make every reasonable effort" to assure the presence of Coyle and Etheridge at the hearing in the *second* removal proceedings. Alternatively, appellant could have sought to cross-examine his "accusatory" witnesses by deposition in those proceedings.

[21] *Williams (1)*, *supra*, 371 U.S. at 532, *vacated on another ground* 372 U.S. 765. In *Lien* v. *United States*, Ct. App. No. 18,362, *per curiam* judgment entered November 2, 1964, unreported, this Court cited *Williams (1)*, along with *United States* v. *L. A. Tucker Truck Lines Inc.*, 344 U.S. 33 (1952), in affirming the District Court's dismissal of the case in C.A. No. 1611-62.

Tucker Truck Lines is a leading Supreme Court decision on the applicability of the exhaustion doctrine—where a party fails to raise an objection in the administrative proceedings, and then seeks to do so, for the first time, on judicial review in the courts. Mr. Justice Jackson, speaking for the Court, there stated, 344 U.S. at 37, that "orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues re-

Second, in any event, this claim of alleged violation of NCPI 750.5-5(b) is clearly devoid of merit:

(1) Appellant did not simply "fail" to request a hearing in the *second* Navy removal proceedings. On advice of retained counsel, he sent the Commanding Officer an impertinent memorandum expressly "abrogating" his earlier request for hearing.[22] Thus, appellant took his case wholly outside the scope and purpose of the provision in NCPI 750.5-5(b) on which he now belatedly seeks to rely.

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viewable by the courts." Unless the issue is timely raised and pressed before the Agency, the Agency is deprived of its proper "opportunity to consider the matter, make its ruling, and state the reasons for its action [or, we add, if warranted, to take appropriate corrective action]." *Unemployment Compensation Commission, etc.* v. *Aragon*, 329 U.S. 143, 145 (1946). To the same general effect: *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 500 (1955); *United States* v. *Capital Transit Co.*, 338 U.S. 286, 291 (1949); *California Interstate Tel. Co.* v. *Federal Communications Commission*, 117 U.S. App. D.C. 255, 258, 328 F.2d 556, 559 (1964).

[22] It is beyond our understanding how appellant can possibly read into the Secretary of the Navy's directions in his December 1, 1961 memorandum (Ex 8), or into the "BUWEPS" memorandum (letter) of September 14, 1961 (Ex 12 and Br, Appendix A), "notice" to the Commanding Officer "that if he thereafter intended *lawfully to discharge* appellant, *he would have to hold a hearing.*" (Br, 14, appellant's emphasis in original).

We also confess our inability to follow how appellant can (br, pp. 22-23, 25-27) make these memoranda out to be "written" and "specific" instructions which the Commanding Officer violated when he acted in the *second* Navy removal proceedings upon the basis of appellant's "abrogation", on advice of retained counsel and for specified reasons, of his earlier request for hearing.

The memorandum of the Secretary dated December 1, 1961 simply stated that under NCPI 750.6-4 "when an individual is returned to duty on a finding of procedural defect, the employing activity may initiate new and procedurally correct action." And the BUWEPS memorandum (letter) of September 14, 1961 simply noted procedural deficiencies in the abortive *first* Navy removal proceedings. It did not purport to be a directive to the Commanding Officer governing his removal action in the case, irrespective of appellant's waiver of hearing in the *second* Navy removal proceedings. Nor did the Secretary's memorandum of December 1, 1961 purport to make it such a directive.

(2) It clearly appears there was no abuse of discretion in the Commanding Officer's acting upon the basis of appellant's deliberate waiver of hearing. Appellant's memorandum, written on advice of retained counsel, was impertinent, and the reasons stated for appellant's "abrogation" of his earlier request for hearing were patently contrived.

As we have observed: Appellant later retracted the contention that the proceedings in the *second* Navy removal proceedings were in violation of "the orders of higher echelon." His contention that the Navy's second removal proceedings were placing him "in double jeopardy" is obviously baseless. His contention that a new hearing would "serve no useful purpose as no new charges were presented" was wrong. A new specification charging another homosexual act with Coyle was made. And his contention that he had "already successfully answered the old charges" was in error. The Secretary of the Navy's invalidation of the *first* removal proceedings rested exclusively on procedural deficiency, not on the "merits". Finally, his threatening to take legal steps against "all persons acting singly or in joint conspiracy" (including the Commanding Officer, we infer), in respect of the "illegal action" against him showed the Commanding Officer that appellant then really wanted no part of any new hearing in the matter.[23]

Under these circumstances, the Commanding Officer's acting on the basis of appellant's deliberate waiver of hearing was fully justified and well within the discretionary authority vested in the Commanding Officer by NCPI 750.5-5(b). Furthermore, under these circumstances, the Navy was entitled to consider as competent evidence in its *second* removal proceedings the sworn statements of Coyle and Etheridge, made in affidavit form. As we have noted:

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[23] See *Wissner* v. *United States*, 126 Ct. Cl. 1372, 1375 (1966), reiterating the view earlier expressed in *Kaers* v. *United States*, 175 Ct. Cl. 111, 114 (1966). There, in analogous circumstances, the Court of Claims has sagely observed, "it seems that what [the discharged employee] *** really wanted was the 'exception' rather than the evidence cross-examination might have provided."

This case involves the discharge of a non-veteran under the Lloyd-LaFollette Act provisions. Even under the provisions of Section 14 of the Veterans' Preference Act, the Agency may properly rely upon affidavits to supply "the factual basis" for its discharge action. And, if the removed employee does not make "proper and timely" request for cross-examination of the affiants under the applicable regulations, he is thereafter barred from complaining on court review that the Agency relied on affidavits alone to supply "the factual basis" for its discharge action.[24]

The next claim appellant presses here is the main procedural objection he raised administratively before the Commission: He contends (br, 31-34) that the charges in the *second* Navy remand proceedings "lacked the specificity required by the applicable removal procedure." This contention was succinctly disposed of by the CSC Regional Director in his decision of March 30, 1962. (Ex 9.) The Regional Director there ruled:

> It is our finding that even an innocent person presented with the instant charges would have reasonable opportunity for refutation, since the *nature* of the alleged misconduct is clearly set forth and the time and place of the alleged acts of homosexuality are stated with enough particularity to meet regulatory requirements. [Emphasis in original.]

The CSC Board of Appeals and Review in its decision of August 13, 1962 expressed its concurrence with the CSC Regional Director's decision. (Ex 10.) The Board added—

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[24] *Williams* v. *Zuckert*, *supra*, appears to be dispositive here. That case likewise involved homosexual charges. The Agency there also relied upon affidavits which supplied "the factual basis" for its discharge action. *Williams* has been followed in *Jenkins* v. *Macy*, 357 F.2d 62, 70 (8th Cir. 1966); *McTiernan* v. *Gronouski*, 337 F.2d 31, 37 (2d Cir. 1964); *Studemeyer* v. *Macy*, 228 F. Supp. 411, 413-414 (D.C. 1964), *aff'd per curiam* 120 U.S. App. D.C. 259, 345 F.2d 748, *cert. denied*, 382 U.S. 834 (1965). NCPI 750.5-5f(2) provided that where necessary the Navy could rely on affidavits to supply the "factual basis" for its discharge action.

> The reasons for the proposed removal were set forth in the Commanding Officer's letter [of charges] of January 25, 1962, and its attachments [the affidavits of Etheridge and Coyle], with sufficient specificity and detail to give * * * [appellant] * * * an adequate understanding of the charges against him and to provide a fair opportunity for refutation.
>
> [Bracketed material supplied.]

In our view, these Commission decisions correctly disposed of this issue. We deem it unsubstantial.

As for the remaining procedural issues appellant seeks to litigate on this appeal: *First*, as we have observed, appellant raised none of them administratively. Hence, he is barred by the exhaustion doctrine from litigating them on review in the courts. *Second*, in any event none of them is well founded. Again, we deem them unsubstantial. We turn to discuss each of them briefly:

1. Appellant errs in contending (br. 20-21) that NCPI 750.6-4(b) required that the *second* Navy remand proceedings be instituted within 15 days of appellant's reinstatement. Its terms were clearly permissive, not mandatory. The Christmas-New Year holiday period intervened. And there was in any event substantial compliance therewith. When restored to duty on December 21, 1961, appellant was on notice that the Navy planned to institute at once new, procedurally correct, removal proceedings in his case. Hence, he sustained no prejudice whatever from the brief delay involved.

2. Appellant also errs in contending (br, 21-22) that NCPI 750.2-3(c) required the Commanding Officer to redetermine, at the time the *second* Navy removal proceedings were initiated, that a "prima facie" case existed. We do not read NCPI 750.2-3(c) as being applicable where "new and procedurally correct" removal proceedings are initiated pursuant to NCPI 750.6-4(b), after a removal action has been "found to be procedurally defective." But assuming *arguendo* that it does, we submit that the District Court was correct in concluding that the Commanding Officer had

sufficient evidence, in the three affidavits of the two young Navy enlisted men involved, Etheridge and Coyle, to go forward with the *second* Navy removal proceedings. (Tr, 41-42).

This Court should therefore affirm the Navy's final removal action as being procedurally in accord with law.

C. The Navy's removal action, upon conclusion of its *second* removal proceedings, is supported by ample "rational basis in the evidence," and is in no way arbitrary or capricious.

As we have developed, the Navy was entitled under the governing statute and Navy regulations to consider, and did consider, as competent and credible evidence in its *second* removal proceedings the sworn statements adverse to appellant made by Etheridge and Coyle in their affidavits. These statements essentially supplied the factual basis for discharge. The Commanding Officer concluded on his review of the record in the *second* Navy removal proceedings that appellant had engaged in the homosexual sexual acts with Etheridge and Coyle, as charged; that such homosexual acts constituted "immoral conduct"; and that appellant's removal on this ground was in the "best interests of the federal service."

Appellant's attack on the sufficiency of the evidence (br. 31) is unavailing. We have detailed the very damaging contents of Coyle's second affidavit of July 12, 1961. His earlier affidavit, and Etheridge's affidavit, were also damaging evidence establishing appellant's participation with them in the unnatural sexual acts described therein.

Coyle's affidavit of July 12, 1961 was executed at a time when no motivation to get out of the Navy could be particularly ascribed to him. Nor, on the record, was he seeking to get out of the Navy when he executed his earlier affidavit on May 12, 1961. He had volunteered for a four-year enlistment, and had been in the Navy since 1959. He was 20 years of age at the time of his homosexual involvement with appellant.

As for Etheridge, he wanted to stay in the Navy. Before he got involved with appellant, he had never been in any trouble, in or out of service. He, too, had volunteered for

a four-year enlistment. He had been in the Navy since 1960. He was 18 years of age at the time of his participation with appellant in the homosexual acts described in his affidavit.

Thus, there is here ample "rational basis in the evidence" to sustain the Commanding Officer's fact-finding that appellant "did commit [the] homosexual acts with * * * Etheridge and * * * Coyle as described in the advance notice [of charges] and in their [sworn] statements."

We believe appellant's further substantive attacks (br, 34-38) on the Commanding Officer's final discharge action are clearly lacking in merit.

First, again, appellant's failure to raise these issues administratively bars him from seeking to litigate them, for the first time, before the courts, under the exhaustion doctrine.

Second, we think there can be no doubt the Commanding Officer correctly concluded that appellant's commission of the homosexual acts with two young Navy enlisted men involved, constituted "immoral" conduct warranting his discharge in the "best interests of the federal service".

As the record clearly discloses, appellant actively solicited the two young Navy enlisted men as homosexual partners. He participated with them seven times in a variety of unnatural sexual acts. All of these homosexual acts occurred practically contemporaneously with the abortive *first* Navy removal proceedings. And the last occurred on June 14, 1961, subsequent to the date of the hearing in those proceedings. These homosexual acts occurred in an environment consisting of a large group of young Navy enlisted men; many of them undoubtedly inexperienced in sexual matters. The particular circumstances surrounding appellant's soliciting and engaging in these homosexual acts with these two young Navy enlisted men make it manifest that appellant's conduct was "immoral" and rendered him unfit for a position as Fire Fighter at the Patuxent Naval Air Station facility.

But, in our view, the Court's determination that the Navy correctly concluded that appellant's homosexual conduct was "immoral", and rendered him unfit for federal employ-

ment, should properly rest on a broader base than the particular circumstances disclosed by the record here.

The official Government position relative to the unfitness for Government employment of persons who have engaged in homosexual acts, has been fully articulated by the Commission in its policy statement of February 25, 1966 (made generally available on April 20, 1966). (Ex L.)

In essence, the Commission therein concluded after full consideration of the matter that persons about whom there is evidence that they have engaged in or solicited others to engage in homosexual (or other sexually perverted) acts with them, without evidence of rehabilitation, are not suitable for federal employment.

In the Commission's view: Fitness determinations "comprehend the *total* impact" of a person engaging in homosexual conduct "upon the job." (Our emphasis.) Among the relevant considerations are the undoubtable "revulsion of other employees by homosexual conduct and the consequent disruption of service efficiency"; "the apprehension caused other employees of [and we add, the well-founded possibility that particularly the young and inexperienced will yield and be corrupted by] homosexual advances, solicitations or assaults"; "the hazard that the prestige and authority of a Government position will be used to foster homosexual activity, particularly among the youth"; and "the use of Government funds and authority in furtherance of conduct offensive both to the mores and the law of our society." In conclusion, the Commission declared:

> *** We must attribute to overt acts *** the character ascribed by the law and mores of our society. Our authority and our duty permit no other course.

A Senate Committee has also given careful consideration to the unsuitability for Government employment of persons who engage in homosexual acts which violate the criminal laws and established moral standards of our society. The Committee reached the same essential conclusions as has the Commission. *Report on the Employment of Homosexuals and Other Sex Perverts in Government*, S. Doc. No. 241, 81st Cong. 2d Sess. (1950).

Homosexual acts, commonly understood and described as "unnatural or perverted sexual practices" between persons of the same sex, constitute Sodomy, and violate the criminal law of Maryland, the District of Columbia and all other American jurisdictions. See Md. Code Anno. (1957), Art 27, §§ 553, 554; D.C. Code § 22-3502 (1967 ed); *United States* v. *Kelly*, 119 F. Supp. 217, 219-220 (D.C. 1954); 48 Am. Jur. *Sodomy*, §§ 1, 2. See also Bowman & Engel, *A Psychiatric Evaluation of the Laws of Homosexuality*, 29 Temple Law Quarterly 272, 278-281 (1956).

Nor can it be doubted that, under the established mores of our society, homosexual acts are generally regarded with revulsion and deemed to be patently immoral conduct. This Court very recently affirmed the discharge of the Air Force employee involved in *Williams* v. *Zuckert*, *supra*, for homosexual assaults on Air Force enlisted men, in its sequel decision following remand. *Williams* v. *Brown*, *supra*, Ct. App. No. 19,803 and 20,504, decided October 19, 1967. This Court perceived no difficulty with the substantive conclusion reached there that the discharge was justified. (Slip op., p. 11.)

In *Dew* v. *Halaby*, 115 U.S. App. D.C. 171, 175, 317 F.2d 582, 586 (1963), *cert. dismissed*, 379 U.S. 951 (1964), this Court affirmed the Commission's conclusion that specific homosexual acts, violative of the criminal law of the jurisdiction where they occurred, constitute "conduct of a criminal or immoral nature" warranting the dismissal of an employee from a position as an air traffic controller—even though such acts long pre-dated his employment by the Federal Aviation Agency. It was there observed that "it is difficult to see how *** [the employee] *** could ask a court to hold that the agency erred in *** considering" such homosexual conduct to be "criminal or immoral" within the meaning of the CSC Regulations.

We read each of the three separate opinions in *Scott* v. *Macy*, 121 U.S. App. D.C. 205, 349 F.2d 162 (1965), as accepting the Commission's view that homosexual acts violative of the criminal law of the jurisdiction where they occurred (as distinguished from merely latent homosexuality) are immoral under the established moral precepts of

our society.[25] See, in particular, fn. 13 in Judge Bazelon's separate opinion, 121 U.S. App. D.C. at 207, 349 F.2d at 184, distinguishing *Dew* v. *Halaby*, *supra*. Judge Burger in his dissenting opinion (in our view, correctly) pointed out that *Dew* v. *Halaby* was 'controlling on the substantive aspects of *** [*Scott* v. *Macy*] *** both for [the Court of Appeals] *** and the Commission". 121 U.S. App. at 213, 349 F.2d at 190. Judge McGowan in his separate opinion assumed that homosexual acts are "immoral conduct", but considered that the Commission's notice of disqualification did not sufficiently specify the homosexual conduct to meet the basic requirements of "procedural fairness". 121 U.S. App. D.C. at 208, 349 F.2d at 185. Following the Court of Appeals' remand of that case, the District Court (per Hart, J.) fully concurred with the Government's view that homosexual acts are both criminal and immoral under the established moral standards of our society. *Scott* v. *Macy*, C.A. No. 1050-63, order entered January 16, 1967. Decision is pending on the appeal to this Court from that decision. Ct. App. No. 20,841.[26]

We find little else in appellant's brief to warrant discussion. His reliance (br. 37) on *Pelicone* v. *Hodges*, 116 U.S. App. D.C. 32, 320 F.2d 754 (1963), is misplaced. See *Taylor* v. *United States Civil Service Commission*, 374 F.2d 466, 469-470 (9th Cir. 1967), which rules upon the immorality of

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[25] Appellant's reliance on *Scott* v. *Macy*, and particularly Judge Bazelon's separate opinion, is misplaced. (Br. 18, 28, 34, 37.) We do not understand that Judge Bazelon questioned that homosexual conduct violative of the criminal law of the jurisdicton is immoral and renders the person unfit for Government employment.

[26] We infer from the Court panel's expressed attitude at the argument that this Court's concern there is addressed exclusively to the procedural aspect involved on the current appeal in that case. It appeared that the patent immorality of established, specified homosexual conduct, violative of the criminal law of the jurisdiction, was subsumed by the Court without question. Nor, we believe, was the Court in any way troubled by the relationship between such overt criminal and immoral conduct (as distinguished from merely latent homosexuality) and fitness for federal employment.

lewd conduct violative of the criminal law of the jurisdiction, the issue never reached in *Pelicone*. And appellant's attempt (br. 38) to liken homosexual conduct simply to a physical handicap is absurd.[27]

Accordingly, the Navy's discharge of appellant, for his active solicitation of two young Navy enlisted men as his homosexual partners, and his participation with them in seven homosexual acts violative of the criminal law of the jurisdiction where they occurred, should be sustained as having ample "rational basis in the evidence," and being in no way arbitrary or capricious.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
GIL ZIMMERMAN,
Assistant United States Attorneys.

---

[27] The cases concerned with the "faceless informer" problem, which appellant cites (br, 24-26) are clearly inapposite here. The affidavits of the two young Navy enlisted men involved were made available to appellant. He deliberately chose, on advice of retained counsel, to waive his right to hearing.

APPENDIX

INDEX TO APPENDIX

STATUTE INVOLVED

Lloyd-LaFollette Act, Section 6(a), 37 Stat. 555, as amended, formerly 5 U.S.C. 652(a), currently 5 U.S.C. 7501, as in effect at all times relevant to litigation

5 U.S.C. 652. Removal without pay from classified civil service

(a) Only for cause; notice; copy of charges; time to answer; examination; record; persons exempt.

No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. Copies of the charges, the notice of hearing, the answer, the reasons for removal or suspension without pay, and the order of removal or suspension without pay shall be made a part of the records of the proper department or agency, as shall also the reasons for reduction in grade or compensation; and copies of the same shall be furnished, upon request, to the person affected and to the Civil Service Commission. This subsection shall apply to a person within the purview of section 863 of this title, only if he so elects.

CIVIL SERVICE COMMISSION REGULATION INVOLVED

Title 5, Code of Federal Regulations, Part 9, as in effect at all times relevant to litigation (in pertinent part)

* * * * *

§ 9.202 Procedure for taking adverse action.

(a) *Effecting the action.* The following procedures shall be observed when an agency proposes to take adverse action against an employee who is not serving a probationary or trial period * * *.

(1) *Notice of proposed adverse action.* The agency shall notify the employee in writing of the proposed adverse action and the reasons therefor. This notice shall set forth, specifically and in detail, the reasons for the proposed adverse action.

(2) *Employee's answer.* The employee shall be allowed a reasonable time for filing a written answer to the notice of proposed adverse action and for furnishing affidavits in support of his answer. The employing agency may, in its discretion, grant the employee a hearing. If the employee answers the notice, his answer shall be considered by the agency in reaching its decision on the proposed adverse action.

(3) *Notice of decision.* The employee shall be furnished at the earliest practicable date with written notification of the agency's decision on the proposed adverse action. The notification of final decision shall be delivered to the employee at or before the time the action will be made effective. When the decision is made to take adverse action, the notification shall inform the employee of:

(i) The adverse action to be taken and the reasons therefor;

(ii) The effective date of the action; and

(iii) The employee's right of appeal to the appropriate office of the Commission and the time limit within

which his appeal must be submitted to the Commission * * *.

* * * * *

§ 9.301 Right to appeal.

(a) *On procedures.* An employee entitled to the benefits of this Part may appeal in writing to the Commission on the grounds that the procedures required by § 9.202 have not been followed.

* * * * *

§ 9.302 Time limits.

An appeal may be submitted at any time after the notice of adverse decision but not later than ten (10) days after the effective date of the adverse action * * *.

* * * * *

NAVY REGULATION INVOLVED

Navy Civilian Personnel Instructions 750, as in effect at all times relevant to litigation (in pertinent part)

5-3. **PROCEDURE "B".**

a. **Coverage.**

This procedure shall be used when it is proposed to suspend for more than 30 days, demote, or remove the following employees:

(1) Any career, career-conditional, overseas limited, or indefinite employee in a competitive position who is not serving a probationary or trial period. * * *

* * * * *

c. **Advance Notice.**

* * * * *

(3) **Specific charges.**

The advance notice shall state the charge or charges, and the evidence in support thereof, relating to the proposed

action, specifically and in detail, including dates, specific instances and other data, sufficient to enable the employee to fully understand the charges and to adequately join issue with the proposed action. • • •

(4) **Reasonable time to answer.**

The notice shall advise the employee that he may reply personally and in writing to the proposed action and that he may furnish affidavits in support of such answer. A reasonable time (no less than 5 work days) shall be allowed the employee for making his answer. "Reasonable time" shall depend on all the facts and circumstances in each case and shall be sufficient to afford the employee ample opportunity to prepare an answer and to obtain affidavits. • • •

(5) **Right to hearing.**

The notice shall advise the employee that he will be granted a hearing, upon request, and may have representation and witnesses as specified in 5-5. • • •

d. **Written decision.**

After all evidence (including that developed in a hearing) relating to the charges has been considered, the employee shall be provided with a written decision. The decision, if adverse, shall state the reasons for the action to be taken and its effective date. The adverse decision must restate the charges and specifications presented in the advance notice of the proposed action and must include the findings made with respect to each charge specifically identified. The findings need not weigh the evidence pro and con. The findings should state specifically what charges in the advance notice were found to be established • • •. • • • In addition • • •, the adverse decision shall state that any evidence submitted or answer made by the employee has been considered • • •. The adverse decision shall advise the employee of his right to appeal as indicated in e below. • • •

c. **Right to appeal.**

(1) When action is taken to suspend, demote or remove an employee, the written adverse decision shall advise the employee of his right to appeal through the grievance procedure in accordance with the rules and time limits specified in NCPI 770. * * *

(2) In addition to the foregoing appeal rights, when a suspension, demotion, or removal action is taken against a nonveteran employee * * *, the written decision shall also advise the employee of the right to appeal to the appropriate office of the Civil Service Commission * * *, provided a prima facie case is established that:

(a) The procedure prescribed by the Commission under Part 9.202 of the Civil Service regulations was not followed or that the administrative requirements of NCPI 750 or any other instructions issued under the NCPI * * * were not followed * * *.

* * * * *

The written decision shall further advise the employee that, if he appeals to the Commission under the foregoing conditions, he may appeal through the Department's grievance procedure within 15 *workdays* after receipt of the Commission's decision. In such case, those aspects of the appeal upon which a determination was made by the Commission will not be given further consideration by the Navy.

* * * * *

5.5. **HEARINGS.**

a. **Purpose.**

Hearings are conducted solely for the purpose of obtaining facts on which an equitable decision may be based and to give the employee an opportunity to present his side of the case. Hearings are purely administrative proceedings; they are not courts nor are they governed by the legal rules of procedure and evidence. However,

they shall be conducted in an orderly manner. All persons concerned must assume responsibility for conforming to appropriate standards of personal conduct or incur the risk of disciplinary action. Further, the employee concerned must assume responsibility for the deportment and assertions of his representative. * * *

b. **General conditions.**

Hearings shall be held whenever action is taken under Procedure "B" and the employee requests such hearing in his reply to charges. Hearings may be held, in the discretion of management, when the employees fail to request such hearing, if it is believed that hearing the case will lead to a better understanding of the issues and more equitable action. Hearings, when requested, should be scheduled as promptly as possible. If an employee fails to give adequate notice or to request a postponement within a reasonable time prior to convening of the hearing, he may be required to present his own case in the absence of representation or witnesses.

* * * * *

(2) When the authority to suspend has been retained by the head of the activity, or when a suspension for more than 30 calendar days, demotion, or removal action is proposed, the head of the activity shall designate a 3-man advisory hearing board of persons who are not in the line over the employee concerned to conduct a hearing. Of the three members selected, there should be one officer and one civilian; the third member may be an officer or a civilian at the discretion of the head of the activity. (NOTE: Officials of Industrial Relations Departments or Civilian Personnel Offices may not serve on such boards.) When the advisory hearing board conducts the hearing, a written report, including the hearing record, shall be made to the head of the activity. The report shall indicate the members who participated and shall include findings of fact, the opinions of the board, and the rec-

ommendation of the board as to disposition of the proposed adverse action. In the event of a split decision, a minority opinion shall be prepared by the dissenting member of the board and forwarded with the board's report.

* * * * *

c. **Employee representatives.**

* * * * *

(2) When the authority to suspend has been retained by the head of the activity, or when a suspension for more than 30 calendar days, demotion, or removal action is proposed, the employee may be represented at the hearing conducted by the advisory hearing board by any two persons of his choice who desire to represent him.

* * * * *

d. **Management representatives.**

When the hearing is conducted by an advisory hearing board, not more than two management representatives may be present to present management's case. Normally, these representatives will be persons in the line over the employee concerned. These representatives may remain throughout the hearing.

e. **Witnesses.**

The employee may call witnesses who have direct knowledge of circumstances and factors bearing on the case. Management may also call witnesses to present management's side of the case. Witnesses may be limited in number on the basis of fair standards which shall be explained to the employee and recorded. Witnesses normally will be present at the hearing only while testifying.

Witnesses under the jurisdiction of the command holding the hearing will be required to attend. Witnesses from without the activity shall be invited to attend the hearing, and every reasonable effort should be made to provide for their presence. When this is not possible, depositions or affidavits as in (2) below may be submitted. Witnesses shall be assured that there will be no reprisal action taken against them for testifying at the hearing.

f. **Conducting the hearing.**

In hearing cases covered by Procedure "B", the following standards and procedures shall be observed:

(1) The employee shall be advised of the purpose of the hearing and of his right to representation and to call witnesses in his behalf. See a, c, and e above.

(2) The employee shall be advised of the charges and of the contemplated penalty. The evidence in support of the charges will then be introduced. The evidence may be in the form of testimony of witnesses and participants and introduction of pertinent documents, materials and equipment. Where necessary, affidavits or depositions may be used, with the employee being allowed a reasonable time in which to obtain counter affidavits or depositions. Charges do not constitute evidence. Classified files may furnish valuable leads and result in the securing of proper and admissible evidence, but they may not be considered in determining guilt, innocence, or the penalty, unless the information contained therein or evidence obtained therefrom is made a part of the record and the employee is given fair opportunity to reply thereto. This means that before the information contained in classified files may be used in these hearings, the equivalent evidence in an unclassified form must be obtained and presented at the hearing.

(3) The employee shall be given full opportunity to reply to and refute the evidence and charges against him and to question all witnesses at the hearing.

(4) Witnesses shall be called individually, advised of

the purpose of the hearing, cautioned to remain as factual as possible in their testimony, and advised that their testimony should not be discussed outside the hearing.

(5) The hearing officer or board shall make every effort to elicit all of the facts bearing on the case whether those facts support the charges or support the employee's position; to confront the employee with the witnesses against him if that is the employee's desire; to assure the employee's full understanding of all phases of the matter; and to confine the discussion and testimony to issues directly related to the case.

(6) When the hearing is conducted by the advisory hearing board, the Industrial Relations Officer or his designated representative shall serve as recorder for the board and as adviser on matters of personnel policy and procedure.

g. **Hearing records.**

An official record of the hearing shall be made, including either a verbatim transcript of the testimony or a summary of each person's statements. The record will include the name and organizational title of the members of the advisory hearing board and all other employees who take part in the hearing. Use of mechanical recording equipment, when available, is advocated. Such equipment provides a record which (1) preserves the atmosphere of the hearing, (2) may be checked, and (3) may be used in training personnel to conduct hearings properly. The employee or his representative shall be given a copy of the record of the hearing upon request. A verbatim transcript shall be provided the employee or his representative upon request, if the activity has the facilities to provide such transcript. The employee or his representative may, after reviewing the copy of the record, or listening to the "playback" of the mechanical record, submit corrections to it on a separate statement, designating pages and lines which are questioned. Otherwise, it will be assumed that there is no disagreement on the record of the hearing.

Where recording equipment is used, the mechanical record shall be retained intact until the case is finally adjudicated.

* * * * *

6-4. CONDITIONS UNDER WHICH BACKPAY IS APPROPRIATE. * * *

* * * * *

(b) When a suspension or removal action is found to be procedurally defective, a new and procedurally correct action may be initiated against the employee. Such action should normally be initiated within 15 days after the date the suspension or removal is cancelled. Even though new action is initiated, the employee is entitled to backpay for the time he was suspended or removed from employment.

* * * * *

Letter of June 22, 1967 from appellant's counsel to Government appellees' counsel asking to be furnished "BUWEPS ltr of 14 Sep 1961 (DCP-S: ACM)"

[HEADING]

June 22, 1967.

Gil Zimmerman, Esquire,
Assistant United States Attorney,
United States Courthouse,
3rd and Constitution Avenue, N.W.
Washington, D.C.

Re: *Connelly* v. *Macy et al.*

Dear Mr. Zimmerman:

In the course of designating portions of the record in the above matter for printing in the Joint Appendix in the Court of Appeals, I noticed that one of the letters contained in Government Exhibit 1, filed on February 24, 1967 — to wit, a communication, dated 1 December, 1961, from the Secretary of the Navy to the Commanding Officer: U.S. Naval Air Station, Patuxent River, Maryland — specifically states on its face:

> "2. In this connection, it is noted that the defects in procedure were brought to your attention by reference (a)."

"Reference (a)" is described in that communication as "BUWEPS ltr. of 14 Sep. 1961 (DCP-5:ACM)". The communication so referenced and described was not included in any of the Government's Exhibits before the District Court.

In fairness and justice to the former federal employee here involved and so that the entire pertinent record will be available to the Courts, I now call upon you to produce a copy of this missing communication for my inspection and copying. I also request a copy of any report filed with Admiral Lawrence or the Secretary in response to the last

paragraph of the said letter of 1 December 1961, which states:

> "5. A brief report as to the disposition of this case is requested to complete the record."

With appreciation for your prompt and fair attention to this request, I am,

Sincerely,

/s/ Ed. L. Merrigan.

ELM:ab

Reply letter of July 7, 1967 from Government Appellees' counsel to request of appellant's counsel to be furnished "BUWEPS ltr of 14 Sep 1961 (DCP-S: ACM)"

[HEADING]

July 7, 1967.
DGB:FQX:GZ
Cl. 20785

Edward L. Merrigan, Esquire
Suite 1000, Mills Building
1700 Pennsylvania Avenue, N.W.
Washington, D. C., 20006

Re: Connelly v. Paul H. Nitze, et al., Ct. of App. No. 21,085
(Dist. Ct. C.A. No. 2133-64)

Dear Mr. Merrigan:

This is in reply to your letter of June 22, 1967 addressed to Assistant United States Attorney Zimmerman. You ask to be furnished copies of two documents not included with the certified Government administrative records filed with the District Court.

As we are sure you are aware, it would be improper for you to attempt to seek reversal in the Court of Appeals of a District Court decision, on the basis of documents which were not before the District Court, and which by due diligence should have been presented (if material) to the District Court prior to the time its judgment finally vested. And we will vigorously oppose as improper any effort on your part to rely on them before the Court of Appeals.

In our view, these documents are clearly immaterial. Nevertheless, we enclose herewith copies of the following: (1) The communication from the Secretary of the Navy to the Commanding Officer, Patuxent Naval Air Station, dated December 1, 1961, to which you refer in your letter of June 22, 1967; (2) The "BUWEPS ltr of 14 Sep. 1961 (DCP-S:ACM)", which is the "reference (a)" in the Secretary of the Navy's December 1, 1961 communication. We have been informed by the Department of the Navy that the only "report" made to the Department by the Commanding Of-

ficer was his routine "personnel action" report of the appellant's reinstatement, and subsequent second removal action taken. Since these appear in Government Exhibit 1, a copy of which you have, we see no need to furnish you an additional copy thereof at this time.

Sincerely,

DAVID G. BRESS,
United States Attorney.

By: /s/ FRANK Q. NEBEKER,
Chief, Appellate Division.

Enclosures.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 —285 960/517

APPELLANT'S REPLY BRIEF

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,085

GEORGE A. CONNELLY, *Appellant*

v.

SECRETARY OF THE NAVY, ET AL., *Appellees*

On Appeal From an Order of the United States District Court for the District of Columbia

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TABLE OF CASES

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APPELLANT'S REPLY BRIEF

Appellant could easily consume ten or more pages of this reply brief simply to correct some of the more glaring distortions of fact and to refute some of the grossly unfair prejudicial statements which unfortunately permeate appellees' entire brief before this Court. That exercise, however, will not be necessary because, in the final analysis, appellees' entire case hinges on two basic contentions—and those two contentions are absolutely precluded by

the Constitution of the United States, by appellees' own regulations and by a long line of decisions rendered by this Court and the Supreme Court of the United States to protect federal employees like appellant (with 17 years of unblemished service to the Government) against a summary dismissal from his position on the basis of unproved charges, levelled by arbitrary, capricious superiors who are bent more on persecuting the employee than on fairly and justly administering and following the regulations of their own Department.

POINT I

The Entire Second Removal Proceeding Against Appellant Was Void Ab Initio Because It Was Commenced Too Late Under the Navy Department's Own Regulations

Appellees openly concede in their brief that the Navy Department's own Regulations (NCPI 750, 6-4(b)) provide:

> "When a suspension or removal action is found to be procedurally defective, a new and procedurally correct action may be initiated against the employee. *Such action should normally be initiated within 15 days after the date the suspension or removal is cancelled.* (Italics supplied)

Appellees likewise concede in their brief that, in this case, the *first* removal action against appellant was reversed and cancelled by the Secretary of the Navy on December 1, 1961.[1] And, they likewise admit (at page 3 of their brief) that the second removal proceeding against appellant was not thereafter initiated until January 25, 1962—*i.e. until 56 days after the first removal was cancelled by the Secretary of the Navy.*

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[1] At page 2 of Appellees' brief, they state: "On December 1, 1961, the Secretary of the Navy sustained the grievance appeal; voided *the Commanding Officer's discharge action of June 9, 1961.* However, *the Secretary directed attention to the provision of the applicable Navy regulation authorizing initiation of "new and procedurally correct" removal proceedings.* (See also J.A. 9)

In *Vitarelli* v. *Seaton*, 359 U.S. 535, 546, 547 (1959) Mr. Justice Frankfurter stated the rule to be applied in situations of this kind as follows:

> "An executive agency must be rigorously held to the standards by which it professes its action to be judged . . . Accordingly, if, dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, *that procedure must be scrupulously observed* . . . He that takes the procedural sword shall perish with that sword . . ."

See also: *Olenick* v. *Brucker*, CCA, D.C. 1959, 273 F.2d 819; *Ingalls* v. *Zuckert*, CCA, D.C. 1962, 309 F.2d 659; *Powell* v. *Zuckert*, CCA, D.C. 1966, 366 F.2d 634.

Under the rule of *Vitarelli* v. *Seaton*, the Navy Department was bound by its own Regulations to commence the second removal proceeding against Mr. Connelly *within 15 days after December 1, 1961.* Indeed, in his written decision of December 1, 1961 by which he cancelled the first discharge, *the Secretary of the Navy himself specifically directed the Commanding Officer's attention to Regulation NCPI 750.6-4 quoted above and told him to follow that regulation if he desired to "initiate new and procedurally correct action". (Appellant's brief, Appendix A).*

The record before the Court contains no excuse or reason whatsoever why the Commanding Officer thereupon waited 56 days to initiate the second discharge proceeding. And, now, completely *without any foundation of any kind in the record itself*, counsel for appellees have the temerity to suggest in appellees' brief (page 28):

> "The Christmas-New Year holiday period intervened. And . . . when restored to duty on December 21, 1961, appellant was on notice that the Navy planned to institute at once new, procedurally correct removal proceedings in his case."

We submit the spirit of Christmas had nothing to do with this case; and if it did, it was misused to prolong an agony for appellant, which has continued over many Christmases since 1961. In truth and in fact, however, the "*procedurally correct*" period for commencing the contemplated second discharge proceeding against appellant actually expired, under the Navy's Regulations, on December 16, 1961—i.e.

9 days before Christmas;
15 days before New Year's Day; and
40 days before January 25, 1962,

when the second proceeding was ultimately initiated.

Moreover, even assuming that appellant's arbitrary, capricious superiors at the Naval Station were somehow motivated by the spirit of Christmas, as now contended by their counsel without any support in the record, *why then did they continue to ignore their own regulations through the first 24 days of January, 1962?*

The record is clear, we submit. There was no valid excuse whatsoever for appellees to fail and refuse to follow the Navy's own Regulations—*especially when they were specifically directed to follow that Regulation by the Secretary of the Navy himself in his letter to the Commanding Officer, dated December 1, 1961* if they intended to "initiate a new and *procedurally correct* action" against Mr. Connelly. Thus, in the sense of this Court's opinion in *Ingalls* v. *Zuckert*, *supra*, at page 659:

> "Failure to comply with its own regulation would render appellant's (dismissal) void."

Appellees contend this rule should not be applied here solely because appellant allegedly was not prejudiced by the Navy's failure to follow its own Regulations. No argument, we submit, could be more baseless or misleading. Under the Navy Regulation, and absent any showing of unusual circumstances or conditions which made it im-

possible for the Navy to commence the second discharge proceeding within 15 days, *appellant became clothed with a legal right not to be prosecuted for a second time; a legal right not to have to defend again against the same old groundless charges; not to be placed in double jeopardy, so to speak.* The Navy, by failing to follow its own Regulations and procedures, waived its right to proceed at all —and when it thereafter decided, on January 25, 1962, to attempt to revive and resuscitate its case against appellant, that case was "*legally dead*" and beyond lawful recall. Patently, no action the Navy could possibly have taken could have been more prejudicial to appellant than that of attempting to revive the scandalous charges here involved which had already expired under the applicable Regulation. By so doing, the Navy unlawfully compelled appellant, over his strenuous objections, to sacrifice his job and his entire reputation in the community on the basis of charges which it knew or should have known were laid to rest by the procedural requirements of its own Regulations 40 days before they were even refiled.

The necessity for strict compliance with the time limitations prescribed in the Regulations is, of course, nothing new in the area of federal personnel actions and proceedings. In *Rogers* v. *Hodges*, CCA, D.C. 1961, 297 F.2d 435, petition for rehearing *en banc* denied, 297 F.2d 435, cert. denied 369 U.S. 850, this Court was confronted with a situation wherein a discharged federal employee, who had been hospitalized for a period of time after her removal, failed to file her appeal with the Civil Service Commission within the time limitation prescribed in the Regulations. The Commission's Board of Appeals and Review dismissed her appeal, stating (207 F.2d 436):

> ". . . you have made no showing that circumstances beyond your control prevented you from filing your appeal before August 30, *and in the absence of such a showing, there is no valid justification for waiving the time limit in your case.*" (Italics supplied)

The employee thereupon sued for reinstatement to her position. The District Court entered a judgment for the Secretary of Commerce who had removed the employee, and an appeal to this Court ensued. This Court affirmed, stating (297 F.2d 436):

> "Appellant did not attempt to show the Board any reason for her failure to meet their objection."

Indeed, in the case at bar, when the Navy Department finally got around to commencing the second discharge proceeding against appellant on January 25, 1962, its notice of proposed discharge stated on its face (Appellant's Exhibit 4):

> "Your reply and or request for a formal hearing should be made to the Industrial Relations Officer *within five work days after receipt of this letter.*"

And, the Navy's own Regulations provide that an employee's appeal through the Department's Grievance Procedure from an adverse decision in any case must be made "*within 15 work days*" after receipt of a decision (NCPI 750, 5-3(e); Appellees' Appendix page A7).

Clearly, therefore, the Navy, under the rule of *Rogers v. Hodges, supra*, would expect and require all employees covered by these Regulations *strictly to comply with the time limitations prescribed therein*, and their failure to do so would be construed by the Navy as a "waiver" of the rights provided by said Regulations. *Ergo*, if equal and fair treatment is to prevail under these Regulations prescribed by the Navy itself, then the Navy too must be required to meet the 15 days time limitation established by NCPI 750, 6-4(b); and its failure to do so, without any showing of "reasonable justification", must be construed as a waiver of its right to reassert for the second time a removal action already cancelled once by the Secretary of the Navy because the Navy, during the first proceeding, failed to follow correct and proper procedures under its own Regulations.

POINT II

Appellant's Letter of February 1, 1962 in No Respect Contained a Plea of Guilty to the Charges Belatedly Reasserted Against Him by the Navy; in No Respect Did It Relieve the Navy of the Burden of Proving Those Charges Beyond a Reasonable Doubt; and in No Respect Did It Relieve the Navy From Its Duty Under the Federal Constitution and Its Own Regulations To Confront Appellant With All of the Witnesses Against Him and Upon Whose Testimony or Evidence the Navy Relied in Reasserting Those Charges.

At page 32 of their brief, appellees go to great lengths to show that the charges belatedly reasserted by the Navy against appellant in January, 1962 were indeed of a *heinous, criminal nature*. They state: "Homosexual acts, commonly understood and described as 'unnatural or perverted sexual practices' between persons of the same sex, constitute Sodomy, and *violate the criminal law of Maryland, the District of Columbia and all other American jurisdictions*. Nor can it be doubted that, under the established mores of our society, homosexual acts are generally regarded with revulsion and deemed to be patently immoral conduct."

Appellant submits that when charges of that nature are asserted against a federal employee, the employee stands protected by the Fifth and Sixth Amendments to the Constitution. Thus, upon a plea of *not guilty* against those charges, said employee—

(1) cannot be compelled to be a witness against himself;

(2) cannot be deprived of his federal position without due process of law;

(3) must be fully informed of the nature and *cause* of the accusations against him;

(4) must be confronted with the witnesses against him; and

(3) where the applicable regulations, such as the Navy Regulations here involved, (a) direct that the Navy has the burden of proof and (b) that there must be "sufficient evidence to justify a presumption of guilt beyond a reasonable doubt" and (c) that a hearing should be held, even "when the employee fails to request such hearing if it is believed that hearing the case will lead to a better understanding of the issues and more equitable action",—a hearing *must* be held before the employee can be lawfully and Constitutionally discharged from his position.

The reasoning underlying appellant's position in this regard is perhaps best stated in the dissenting opinion of Justices Douglas and Black in the first *Williams* v. *Zuckert* case, 371 U.S. 531, decided by the Supreme Court in 1963. They stated, at 371 U.S. 533-536:

> "After 16 years of faithful government service, petitioner has been branded with a stigma and discharged on the strength of three affidavits . . . *We have heretofore analogized these administrative proceedings that cast the citizen into the outer darkness to proceedings that 'involve the imposition of criminal sanctions'; and we have looked to "deeply rooted" principles of criminal law for guidance in construing regulations of this character. Peters* v. *Hobby*, 349 U.S. 331 . . .; *Greene* v. *McElroy*, 360 U.S. 474 . . . *By that analogy we should construe the present Regulation as being protective of the right of confrontation*, not as providing a technical way in which the right is either saved or lost.
>
> "Confrontation and cross-examination are, as I understand the law, vital when one's employment rights are involved . . . Petitioner is not merely being "denied . . . the opportunity to work at one isolated and specific military installation" . . . The stigma now attached to him will follow him, whatever employment he seeks. *The requirements of due process provided by the Fifth Amendment should protect him against this harsh result by giving him the same right*

> *to confront his accusers as he would have in a criminal trial* . . . For this discharge will certainly haunt his later life as much as would a conviction of willful evasion of taxes." (Italics supplied)

Justices Douglas and Black went on to state at 371 U.S. 534 et seq:

> "A trial for misconduct involving charges of immorality, like one for disloyalty, is likely to be "the most crucial event in the life of a public servant. If condemned, he is branded for life as a person unworthy of trust or confidence. To make that condemnation without meticulous regard for the decencies of a fair trial is abhorrent to fundamental justice . . ."
>
> ". . . *Petitioner does more than rely on the Regulation. He relies on the Fifth Amendment and the Sixth Amendment* . . .
>
> "*We should not saddle these administrative proceedings with strict formalities concerning the manner in which exceptions or objections are made. They have no place in criminal proceedings* . . .; *and it is unhealthy to let them take root in administrative hearings where human rights are involved that are as precious to "liberty", within the meaning of the Fifth Amendment, as a person's right not to be fined or imprisoned unless prescribed procedures are followed.*" (Italics supplied)

The reasoning expressed by Justices Douglas and Black in their dissent in *Williams* v. *Zuckert* was soon thereafter effectively reconsidered by the Supreme Court as a whole. As a result, on April 22, 1963, the Court granted a rehearing in that case and *vacated* its earlier order which had dismissed the writ of certiorari (*Williams* v. *Zuckert*, 372 U.S. 765).

The same reasoning as that expressed by Justices Douglas and Black in *Williams* v. *Zuckert*, *supra*, was also shortly thereafter adopted by this Court in its opinion in *Scott* v. *Macy*, 121 U.S. App. D.C. 205, 349 F.2d 182 (1965). There, an applicant for federal employment was

disqualified by the Civil Service Commission on the ground the Commission had information that "*you are a homosexual*". Like appellant in the case at bar, Scott was allegedly disqualified "*because of immoral conduct*". Chief Judge Bazelon, writing for this Court, reversed a District Court judgment which had upheld the Commission's action, stating at 349 F.2d 183, 184:

> "Appellant is an applicant for public employment, and thus may have less statutory protection against exclusion than an employee. *But, he is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government . . .*
>
> "The Commission excluded appellant from public employment because it concluded that he had engaged in "immoral conduct". With this stigma, the Commission not only disqualified him from the vast field of all employment dominated by the Government but also jeopardized his ability to find employment elsewhere. The stigmatizing conclusion was supported only by statements that appellant was a "homosexual" and had engaged in "homosexual conduct". These terms have different meanings for different people . . . *Appellant's right to be free from governmental defamation requires that the Government justify the necessity for imposing the stigma of disqualification for "immoral conduct".*" (Italics supplied)

In still other federal employee discharge decisions rendered by this Court since the Supreme Court reversed itself in *Williams* v. *Zuckert*, *supra*, this Court has ruled—

> (1) in *Pelicone* v. *Hodges*, CCA, D.C. 1963, 320 F.2d 755, 757: "Since it appears that appellant's dismissal on this charge was predicated *on the 'assumed' criminal nature* of his conduct . . . appellant's dismissal cannot be sustained, and he is entitled to reinstatement to Government service."; and

(2) in *Weinberg* v. *Macy*, CCA, D.C. 1965, 360 F.2d 816, 819: "*At any rate, the burden from the beginning was upon the Government in the discharge proceeding*, and that burden must necessarily be to establish intentional falsification . . . If the Government appellees are of a mind to pursue this matter, it is to be expected . . . that they will make an earnest effort to present, or cause to be presented, . . . full evidence as to exactly what transpired . . ."; and

(3) in *Powell* v. *Zuckert*, CCA, D.C. 1966, 366 F.2d 634, 640, 641: "The second and fifth charges were proved in part by the affidavit of Miss Muira, in violation of Air Force regulations covering discharge hearings . . . Thus, insofar as appellant's discharge was based on charges supported by this evidence, his removal was invalid."

Considered in the light of these authorities and in view of the *criminal nature* of the charges the Navy Department endeavored to reassert against appellant in January, 1962, we submit that his letter of February 1, 1962 in no respect constituted a plea of "guilty" to those charges. *On the contrary, that letter was an emphatic, defiant plea of "not guilty"*. Indeed, it read as follows in its entirety (Appellant's Exhibit 6; J.A. 12):

"You would be pleased to know that I directed a memorandum, dated January 30, 1962, to the Industrial Relations Officer at the installation, requesting a formal hearing in the matter of my proposed removal action. Since the date of the said memorandum, being possessed of legal advise (sic) advising me of my rights, I am hereby abrogating the memorandum and pray that you take no notice of my request for a formal hearing. A hearing would serve no useful purpose *as no new charges were presented, and I have already successfully answered the old charges.*

"*In reply to your notice of proposed removal, please be assured that I plead innocent to any and all charges*

stated and presumed in your letter. Once before, you were pleased to remove me from service on the same identical charges and, pursuant to my successfully appealing the said decision, I was reinstated on my job. Your present disposition, if earnest, to re-dismiss me from service on an identical set of charges is an undisguised attempt to nullify the orders of higher echelon and a deliberate case of placing me in double jeopardy.

"*I request that you see fit to put an immediate arrest to the illegal and improper personnel action which, if allowed to go through, threatens to jeopardize my interests.* Failing your rescinding the illegal action, I wish to advise you that I will be compelled to take appropriate legal steps to protect my job rights and seek such legal action against any and all persons acting singly or in joint conspiracy to defame me by their false, pernicious and damaging accusation.

"If further communication or correspondence is required in regard to this matter, please refer it to my attorney, Mr. Wm. Loker, Jr., Leonardtown, Maryland. His telephone number is Greenwood 5-2631." (Italics supplied)

Reasonably construed, this letter contains no more than appellant's *contention* that "a hearing would serve no useful purpose" because "*no new charges were presented and I have already successfully answered the old charges*". That letter thereupon asserts appellant's *clear-cut, unequivocal plea of "not guilty"* to the charges, belatedly and illegally asserted against him by the Navy for the second time.

Accordingly, even if, as appellees repetitiously contend in their brief, that letter could somehow be tortured and twisted into a "waiver" by appellant *alone* of *his absolute right* to a hearing under the Regulations, *it still did not relieve the Navy, which admittedly was asserting criminal charges against appellant to which he had pleaded "not guilty", of its obligations under the Fifth and Sixth Amend-*

ments to the Constitution, the aforementioned decisions of the Supreme Court and this Court, and its own Regulations to hold a hearing on its own motion at which appellant would be confronted with all of the evidence and witnesses against him; at which the Navy would endeavor to meet the legal requirement of carrying the burden of proof, and of establishing the charges against appellant beyond a reasonable doubt; and at which appellant, thus confronted with the evidence and the entire case against him, would be afforded a full and fair opportunity to defend himself.

If, as Justices Douglas and Black stated in their opinion in *Williams* v. *Zuckert*, *supra*, and if, as this Court has stated and implied in the decisions hereinabove mentioned, we are to look "*to deeply-rooted principles of criminal law for guidance*" *in federal employee discharge cases of the nature here presented*, then appellant's plea of "not guilty" in his letter of February 1, 1962 *had the immediate legal, constitutional effect of putting the Navy Department to its burden of proving every element of the criminal charges asserted against appellant beyond a reasonable doubt and it placed in issue all of the essential averments against the appellant.* (Rule 11, Federal Rules of Criminal Procedure: *Wood* v. *United States*, 75 U.S. App. D.C. 274, 128 F.2d 265; *Byrd* v. *United States*, 119 U.S. App. D.C. 360, 342 F.2d 939; *Roe* v. *United States*, CCA. Tex. 1961, 287 F.2d 435, cert. denied 368 U.S. 824.)

In *Byrd* v. *United States*, *supra*, this Court stated the rule as follows, at 342 F.2d 939, 941:

> "By pleading not guilty, the accused puts the Government to the burden of proving every element of the crime beyond a reasonable doubt."

And in *Wood* v. *United States*, *supra*, this Court stated, at 128 F.2d 273:

> "The function of that plea is to put the Government to its proof and to preserve the right to defend."

Viewed in this light, appellant's letter of February 1, 1962 clearly "put the Navy to its proof" and "preserved (appellant's) right to defend". True, he stated that because he had already successfully defended against substantially the same charges during the invalidated first discharge case, he felt a second hearing was unnecessary and that the Navy should forthwith drop or dismiss those charges reasserted for the second time. But, simultaneously, and in the same letter, his clear-cut plea of "not guilty" placed the Navy on notice that, if it intended nevertheless to proceed again, the Navy had the burden of proof and appellant preserved the right to defend.

And, of course, in cases of that nature, the Navy staff, by its own Regulations, voluntarily assumed this burden of proof in advance and provided that none of its employees could be discharged unless the charges against him were proved beyond a reasonable doubt (NCPI 750, 2-3(c)).

Accordingly, we submit again that when the Navy discharged appellant without complying with these essential requirements of the Constitution and its own Regulations, appellant's discharge was a nullity from the outset.

In their brief, appellees label appellant's letter of February 1, 1962 as "impertinent". We submit that the letter is a rather patient, restrained dissertation considering the lengths appellant's arbitrary, capricious superiors had gone and were apparently prepared to go to ruin and stigmatize him for life.

Appellees also suggest that appellant wrote that letter and urged that a trial was not necessary because (a) he wanted to avoid the possibility that he himself might be cross-examined; and (b) he feared that Coyle, one of the two persons who had executed an affidavit against him, might now be prepared to appear and personally testify against him, without assertion of the privilege against alleged self-incrimination upon which Coyle had relied during the first discharge proceeding. *There is absolutely no*

basis for this prejudicial nonsense in the record. These suggestions are strictly a newborn figment in the imagination of counsel for the appellees. However, the short answer to these unsupported arguments is this: If the Navy honestly ever believed appellant feared to be further cross-examined, or that the Navy's case against him would be strengthened by such further cross-examination, then why did the Navy fail to schedule a hearing at which appellant would be questioned again? (Appellant, of course, was thoroughly examined and cross-examined by the Navy at the first hearing and that record is before the Court (J.A. 6, 7).

Or, if the Navy believed Coyle had suddenly agreed to change his mind and testify openly against appellant as he absolutely refused to do at the hearing in the first discharge case, then why did the Navy fail to schedule a hearing at which Coyle could be called for that purpose?

Patently, these arguments, now unfairly advanced by appellees' counsel against appellant, could have and should have been resolved by the Navy itself—because it had the full power and duty under its own Regulations to obtain this testimony and evidence if it felt it was available through the simple device of scheduling a hearing as provided in the Regulations. This, of course, it failed to do.

CONCLUSION

For all the reasons stated in our main brief and this brief, the summary judgment of the District Court, entered without opinion, findings of fact or conclusions of law, should be reversed and appellant should be ordered reinstated to the position he faithfully performed for 17 years prior to this illegal, unconstitutional discharge.

Respectfully submitted,

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